STRENGTHENING THE REGULATORY FLEXIBILITY ACT

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

WASHINGTON, DC, JANUARY 23, 1995

Printed for the use of the Committee on Small Business

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STRENGTHENING THE REGULATORY FLEXIBILITY ACT

MONDAY, JANUARY 23, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m., in room 2359–A, Rayburn House Office Building, Hon. Jan Meyers (chairwoman of the committee) presiding.

Chairwoman MEYERS. Ladies and gentlemen, we are very glad to have you with us today. Our hearing this afternoon focuses on the Regulatory Flexibility Act, which became law in 1980 and was the result of the very earnest efforts of many small businesses throughout this country.

The issue of regulatory relief and regulatory flexibility was a dominant theme at the 1980 White House Conference on Small Business, and the participants at that conference pushed hard for passage of legislation to help lighten the load of regulation arbitrarily applied to big and small business alike.

A lot of times the difference between big and small business is people. Big business just may have more people on board that can help them interpret Federal regulations and do the paperwork associated with Federal regulations, whereas small businesses just do not, and it is the small businessman or woman himself or herself that is actually sitting there late at night doing the work.

Today, compliance with Federal regulation remains an often burdensome task for small businesses. Originally, the rationale behind the Regulatory Flexibility Act was really quite simple. One, Federal agencies often do not recognize the impact that their rules will have on small businesses; and small businesses are more likely to be disproportionately disadvantaged by Federal regulation compared to larger businesses.

The Regulatory Flexibility Act was enacted to secure Federal agency recognition of these factors and require agencies to attempt to reduce the regulatory burden on small business by writing better rules. By mitigating the potentially adverse impact of Government regulation on small business, the viability and success of small business will be determined in the marketplace and not by someone drafting regulations in a distant Federal office building.

The Regulatory Flexibility Act has met with some success, but there is no enforcement mechanism and that means that it is widely ignored by some agencies. At the beginning of the 103d Congress, Representative Tom Ewing introduced H.R. 830 to address this problem and bring about an enforcement mechanism. This was

not really a partisan thing; there was tremendous bipartisan support for H.R. 830. It was amended into a bill in the Senate. It passed by a substantial margin.

It came to the House. It was offered here as a motion to instruct, and it passed in the House by a vote of 380 to 36, and so it is obviously not a partisan issue at all.

I am acutely aware of this issue's importance to the small business community. I hope that the members of this committee and of the House in general can demonstrate the same bipartisan support for the contract provision that was demonstrated for H.R. 830 last year.

Our panel today is made up of Mr. Jere Glover, who is Chief Counsel for Advocacy of the Small Business Administration; Mr. Jack Faris, president and CEO of the NFIB, the National Federation of Independent Business; Mr. Charles "Rusty" Griffiths of Binghamton Slag Roofing Company in Binghamton, New York; Mr. James Carty, vice president of the National Association of Manufacturers; Mr. Robert Pool, Homestyle Publishing, Edina, Minnesota; and Lee Taddonio, vice president of TEC/Pennsylvania Small Business United of Pittsburgh.

At this time I would like to recognize Mr. LaFalce, who will have some comments.

Mr. LAFALCE. Thank you very much, Chairwoman Meyers. I thank you for scheduling today's hearing on a matter of vital and continuing concern to our Nation's employers. Signed into law almost 15 years ago, the Regulatory Flexibility Act was a landmark effort to reduce the overwhelming burden of regulatory requirements on small business.

In a nutshell, this critical piece of legislation requires that Federal agencies perform a good-faith analysis of the costs and other impacts new regulations may impose on small enterprise and to minimize those impacts. The core theory underlying the act is that the burden of Federal requirements is disproportionately high on small employers. Without economies of scale, the cost of meeting Federal demands may literally drive some of these enterprises out of business.

With small businesses creating in the neighborhood of four out of five new jobs in our economy, unnecessary business-killing regulations are something we cannot afford. So, it is very timely that our committee again revisit this act and review the progress agencies have made in meeting its important goals. We will hear from several businesses who deal with Federal regulatory demand virtually on a daily basis as well as from trade organization representatives.

We all realize that the act has been only partially successful because of some of the inherent weaknesses in the original legislation. Mrs. Meyers and I were leading sponsors of bipartisan legislative efforts in the last Congress to correct those deficiencies. Presumably, our business witnesses today will underscore the great need for those changes.

I want to acknowledge Chairman Meyers' agreement to our request that Jere Glover, the head of the Small Business Administration Office of Advocacy, testify at today's hearing. Mr. Glover has long been supportive of efforts to amend and buttress the Regu-

latory Flexibility Act. I also want to thank her for scheduling further hearings next month to include witnesses from agencies charged with implementing this law. It is our understanding that regulatory flexibility reauthorization legislation will not be reported to the floor before these oversight hearings are fully concluded.

New members of this committee should be aware that the general outline within the Contract With America, H.R. 9, for strengthening and reauthorizing the Regulatory Flexibility Act has had overwhelming bipartisan support in previous Congresses. As Mrs. Meyers stated, the Contract's language on this matter as specified in Title VI mirrors in considerable part H.R. 830, last year's reauthorization bill. This language would strengthen Reg-Flex Act authorities within the SBA's Office of Advocacy, the act's key enforcement agent.

It also would eliminate the current prohibition on judicial review. Business and individuals could challenge in court any agency's compliance with the act. This was something that was sorely missing. These two changes, in and of themselves, would add real teeth to the enforcement of the original act. They surely would force recalcitrant agencies to take seriously the impact of the regulations on small businesses.

But while these changes will have significant bipartisan support, I would be remiss in not registering my very strongest concern about another portion of the Contract, amending the Regulatory Flexibility Act; and this is very important. Title IV of H.R. 9, as I read it, would amend the act by expanding the current definition of businesses which would benefit. In our reading of that language, specifically section 4003, agencies in their rulemakings would be required to consider impacts on all businesses, large and small, regardless of size, regardless of number of employees, regardless of sales, regardless of whether it is a mom-and-pop store or a transnational corporation.

This change, intended or unintended, could seriously jeopardize legitimate rulemaking. Corporate giants with deep pockets could stall needed regulation and it would ignore the driving force behind the act and our original intent to help small businesses overcome the disproportionate financial impacts they absorb within the Federal rulemaking process. Members should think long and hard before accepting this perhaps dangerous change.

Finally, I, too, would like to welcome each and every one of the witnesses to today's hearing. Thank you very much.

Chairwoman MEYERS. Thank you, Mr. LaFalce. If others have opening statements that they wish to submit for the record, that would be acceptable, without objection.

[Mr. Ewing's statement may be found in the appendix.]

Chairwoman MEYERS. Mr. Glover.

TESTIMONY OF JERE GLOVER, CHIEF COUNSEL FOR ADVOCACY, SMALL BUSINESS ADMINISTRATION

Mr. GLOVER. Thank you and good afternoon, Madam Chair and members of the committee. I am honored and privileged to be here today. I would like to specifically thank Congressman Ewing for his

wisdom in introducing H.R. 830 in the last Congress. Clearly, it focused attention on much-needed legislation.

I would first like to talk a little bit about what the Office of Advocacy does as it relates to the Regulatory Flexibility Act. We are given the statutory obligation to review and monitor agency compliance with the Regulatory Flexibility Act. We are also given the right to intervene in agency proceedings and to file amicus curiae briefs in courts where it is appropriate. We also submit an annual report each year evaluating the agencies' compliance with the law.

For some years the Office of Advocacy has been responsible for doing these activities, and we, by and large, have complied with those responsibilities.

I would like to introduce Barry Pineles, for some good, few years one of the chief regulatory advisers to the Office of Advocacy.

Overall, small business is doing very well. Last year we had a record number of new small business incorporations. New businesses with our zero-to-four employees are growing, adding employees at record numbers. But small businesses are doing this in spite of the regulatory burden that Congress, the States and local governments have placed on them.

Clearly, it is important that the Regulatory Flexibility Act be given teeth and be enforced. When it was originally passed, it was intended to be a landmark radical change in the way Government dealt with small business. To some extent it has changed the way Government deals with small business. Some regulatory agencies have been heeding the Regulatory Flexibility Act and have complied and, due to small business analyses, millions of dollars have been saved because of the Regulatory Flexibility Act.

However, many agencies have not complied not complied fully. Unfortunately, despite three different President's Executive orders, the work of all of the previous Chief Counsels and the hard work by this administration, which is the first administration committed to enforcing the Regulatory Flexibility Act, we still find that small business is suffering from significant regulatory burdens.

Agency compliance is, at best, spotty. Some agencies don't comply at all. Other agencies comply sometimes, but where a particular regulation complies with other priorities, they tend not to comply. Some agencies miss the boat and other agencies can't even seem to find the ocean. So, clearly there is a problem and it has been there for some time.

No question, small business feels oppressed by the regulatory climates. I have attended more than half of the White House Conferences on Small Business throughout the country, and a number of States, including Minnesota, Washington State, Indiana, Illinois, Massachusetts, and Virginia have passed recommendations specifically calling for judicial review of the Regulatory Flexibility Act.

Let me tell you one of the things that I heard from a small business person during a hour and a half of debate and discussion about paperwork and regulatory reform. She came to the conclusion and stated it at the White House Conference that it seemed like Washington is more concerned with the survival of snail darters and spotted owls than they are with the survival of small businesses. That message has come across very loud, and I think it is

why I am sitting here with a number of small business representatives.

I have not heard anyone opposing judicial review is the Regulatory Flexibility Act at any of the White House Conferences or any of the meetings that I have held with small business. Nor do I know of any small business association that doesn't strongly support the Regulatory Flexibility Act.

Let me just mention a couple of things that the Office of Advocacy has been doing in this regard. One of the things that I think is important is that the Administrator of SBA now has Cabinet-level status, and, as the previous administration is on the National Economic Council. Clearly, without that status, we would not have been able to convince the administration and the President of the wisdom of judicial review for the Regulatory Flexibility Act. Neither would we have been as successful in trying to encourage agencies that aren't complying to do so. Both Erskine Bowles and Phil Loder worked to achieve administration support for Regulatory Flexibility Act reform.

OMB's Office of Information and Regulatory Affairs and the Office of Advocacy have entered into letters of agreement which provide that we will work together to make sure the compliance with the Regulatory Flexibility Act is as good as it can be. Our joint effort to help enforce the Regulatory Flexibility Act will be an important and valuable asset.

There are two cases in which we have been prepared to file amicus briefs. In both cases, the agencies have capitulated to the Office of Advocacy's position, and filing those briefs ultimately was not undertaken. However, in both cases, the authority to file that brief, and the clear intention that we were going to file had a significant effect on the regulatory environment.

Now, we are looking at why hasn't a great piece of legislation worked? Why do we need to change that legislation.

Chairwoman MEYERS. Mr. Glover, could I ask you to pull the mike a little closer and talk into it. I see some people in the back that look like they can't hear.

Mr. GLOVER. The question is why do we need legislative change. Clearly, without judicial review, it simply hasn't worked. When it is convenient for agencies to comply with the Regulatory Flexibility Act, they do so. When it is inconvenient or they have other priorities that outweigh the small business concerns, they choose not to comply with the RFA. Without a material change in judicial review of the Regulatory Flexibility Act, we are not going to see the changes that we need for small business.

Let me just mention one of the excuses we hear most often from agencies as to why they aren't complying. They allege that either the Congress or the courts, interpreting the original underlying laws, prohibit flexibility and force them to pass on these regulatory burdens. So, one of the things that is important to sure that Congress adopts the principle of the Regulatory Flexibility Act as it goes forward with its legislative reviews.

In sum, I support strong judicial review of the Regulatory Flexibility Act. Thank you very much for allowing me to testify.

[Mr. Glover's statement may be found in the appendix.]

Chairwoman MEYERS. Thank you for being with us, Mr. Glover; and I am glad that you are here today. We intend to have some more hearings on this at a later time, but they will be before the 3-month time period is up because this is one of the issues in the Contract, and so—and we do have sequential jurisdiction of regulatory flexibility, so when it comes from Judiciary, it will come to this committee.

Chairwoman MEYERS. Mr. Faris.

TESTIMONY OF JACK FARIS, PRESIDENT AND CEO, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. FARIS. Madam Chairman, again thanks for the opportunity to be here today. I want to applaud you for holding these hearings. Only by a full discussion about those things that harm the Main Street small businesses will we really have meaningful change inside the beltway that impacts everyone on Main Street in America. We thank you for that.

I am here today representing the National Federation of Independent Business, the Nation's largest organization of its kind, with over 600,000 members. We have been here for some 53 years now, representing the small businesses of America.

Our average member employs five people, and they have about $250,000 in gross annual sales. More importantly for us, we set our policy through the direct polling of our members through the NFIB mandate; therefore, the positions we take today and we will take tomorrow will be the same as we have been taking, and that is as a direct response from small business.

Strengthening the Regulatory Flexibility Act is one of NFIB's and small business' top priorities. I would like to ask, Madam Chairman, if I could have my written testimony submitted for the record.

Chairwoman MEYERS. Without objection.

Mr. FARIS. Many observers of the Washington scene have noted the absence of consensus on a great number of issues that our country faces today, but there is growing bipartisan agreement about two phenomena that are taking place in the small business sector. First, virtually all job growth, net new jobs in this country comes from small business.

Number two, the burden that is created by Federal regulation falls predominantly on the very people we rely on to create jobs: Small business owners. Reform of the Regulatory Flexibility Act is the cornerstone of this second element of consensus regarding small firms. Happily, that consensus has taken shape and gathered momentum.

In the last Congress, reform of the Reg-Flex Act passed both Houses of Congress, but unfortunately no legislation on Reg-Flex came to the President's desk. Still, during the debate to reform Reg-Flex, the administration went on record in favor of reform. In fact, I would like to quote from a recent letter from the President to the Senate, which said "My administration will continue to work with Congress and the small business community next year for enactment, after strong judicial review, that will permit small businesses to challenge agencies and receive meaningful redress when agencies ignore the protection afforded by this statute." We appre-

ciate the President's sign of support and look forward to that support in this Congress.

It is time to turn the consensus into law, and to that end, my testimony today attempts to answer three basic questions: First, what impact are regulations currently having on small business? Second, is the Reg-Flex Act of 1980 a useful tool to address that impact? Finally, what more can be done beyond Reg-Flex to stop the avalanche of regulations from falling on the backs of small business.

First, with regard to the impact of regulation, the statistics speak for themselves. Several studies show the direct cost of regulatory compliance costs business between $500 and $800 billion. Complying with regulation costs our economy dearly; it is a hidden tax. Complying with regulation is no less a tax than any other Government levy. When it comes to businesses, the hidden tax is regressive; it hits the little guy the hardest. It is because of economies of scale, as Mr. LaFalce has commented on.

When regulations present a fixed cost to all businesses, the smaller firm will have a compliance cost that percentage-wise is much higher than that of a large business. Simply put, small business is not equipped to deal with over-zealous regulations, hence the need for regulatory flexibility with teeth.

The Regulatory Flexibility Act was initiated in 1980, signed by President Carter, to help cease the regressive one-size-fits-all regulatory process. Under the law, regulators are supposed to analyze the impact of regulations on small business, but unfortunately as we have heard they ignore the provision. Why? It cannot be challenged in court so they take the path of the least resistance. The law lacks judicial review.

Under the judicial review provision, an agency that fails to adequately consider this particular impact of regulation would be and could be challenged in court. We fully support a strong judicial review component to Reg-Flex and request any legislation give judges the authority to stay a rule if it is challenged in court.

Finally, we hope that any reform legislation include a broad basis for standing to allow any affected small business or small business organization to object or challenge a rule under Reg-Flex.

Beyond Reg-Flex, there are other proposals, many of which are in the Contract with America, that would get at the heart of easing the burden of regulations. NFIB has been fighting for many of these for years. These include reforming the Paperwork Reduction Act, passing H.R. 450 which would enact a 6-month moratorium on new regulations, strengthening private property rights protection, allowing for a cost-benefit analysis and/or risk assessment, establishing a regulatory budget and sunsetting regulations.

Madam Chairman, small business owners spoke loudly on November the 8th. Their message to Washington was plain and simple. Get Government off our backs, out of our pockets and off our land, so we can do what we do best: Build businesses, create jobs, provide for our families, and make meaningful and constructive contributions to society.

When we pass, as we did on November 14, Vol. 59, No. 218 of the Federal Register, how do we expect small businesses to be able to take a short timeframe, to know what is in it, how it affects

their business and be able to take any sort of action? That is the reason we hope we will have longer terms so small business owners can find out what is going on and take redress.

I thank you again for the invitation to be here and I look forward to the other comments from this committee and stand ready to answer questions.

Chairwoman MEYERS. Thank you, Mr. Faris.

[Mr. Faris' statement may be found in the appendix.]

Chairwoman MEYERS. Mr. Griffiths.

TESTIMONY OF CHARLES N. "RUSTY" GRIFFITHS, JR., BINGHAMTON SLAG ROOFING CO., INC., BINGHAMTON, NEW YORK, ON BEHALF OF THE NATIONAL ROOFING CONTRACTORS ASSOCIATION AND ASSOCIATED SPECIALTY CONTRACTORS

Mr. GRIFFITHS. Thank you, Chairwoman Meyers and members of the committee. My name is Charles N. Griffiths, Jr., and I am the owner of the Binghamton Slag Roofing Company in Binghamton, New York. I am the fourth generation of a family business which was founded in 1913. We install both large commercial roofs and smaller residential roofs, and employ nearly 80 people.

I am testifying today on behalf of the National Roofing Contractors Association, NRCA, and I am also here representing the Associated Specialty Contractors, ASC, which is a federation of eight national contractor associations with a combined membership of 26,000 contracting firms. I do appreciate the opportunity to comment today on strengthening the Regulatory Flexibility Act of 1980. Our association NRCA applauds the committee's decision to hold hearings on this issue.

Chairman Meyers, I do have a written statement which I ask to be placed in the record.

Chairwoman MEYERS. Without objection, it is so ordered.

Mr. GRIFFITHS. Thank you.

I would now like to proceed with my summary, which is going to focus on the OSHA asbestos standard which applies to our industry, and that begins on page 5 of my written statement.

Requiring agencies to consistently apply cost-benefit analysis to newly promulgated regulations is one of the first steps in removing the stranglehold that overregulation has on economic growth in this country. An example of the Federal bureaucracy disregard for the cost impact of new regulations is the Occupational Safety and Health Administration, OSHA's, new asbestos standard, which went into effect on October 11th of 1994.

Asbestos-containing roofing materials, which we call ACRM, are present normally in very small amounts in our industry and in an estimated 90 percent of all homes and 58 percent of all buildings in the U.S. today. In the overwhelming majority of these cases, ACRM is present in roof coatings, in cements, in mastics, and in base flashings where asbestos fibers are fully encapsulated in a bituminous or asphalt or resinous-type product.

Despite the Environmental Protection Agency and the Consumer Product Safety Commission's conclusion that there is no likelihood of fiber release from these materials, as they are handled in our industry, OSHA is imposing this onerous standard on all ACRM re-

movals. NRCA estimates that compliance with OSHA's new rules will almost double both the cost and duration of roofing jobs subjected to the standard.

In 1991, OSHA issued a notice of proposed rulemaking for this new standard and OSHA hired CONSAD, which is a favorite consulting firm of the agency, to conduct its economic impact analysis. CONSAD concluded that the annual incremental cost per affected firm would be $324, and the annual incremental cost per affected worker would be $135.

By the way, there is an error in the written testimony that you have. We have a corrected testimony that has the correct $135 figure.

NRCA conducted its own review based on the CONSAD report which demonstrates that OSHA has substantially underestimated the total per firm costs of its new standard. If some, but not all, of OSHA's errors are corrected, the impact on the projected bottom line for roofing would still be huge, and annual compliance costs would be approximately $1.3 billion. OSHA's per worker and per firm cost of $135 and $324, respectively, are also grossly underestimated.

NRCA estimates that the average annual cost would be approximately $7,759 per worker and $47,515 per firm. This could easily erase the profit margins of small- and medium-size firms.

Why is there such a incredible discrepancy between OSHA's figures and our estimates? In short, OSHA's regulatory impact analysis reflects major omissions. For example, OSHA cost figures only take into consideration built-up Roofing removal. Built-up Roofing is roofing installed with layers of hot asphalt. By covering only built-up Roofing removals and repairs, OSHA has failed to cover the vast majority of roof removals and repair jobs using other estimates. NRCA estimates that removals of asbestos-containing BUR constitute less than 12 percent of all roofing jobs.

Mrs. Meyers, I cannot emphasize enough the drastic impact this standard will have on my business and the roofing industry in general. The industry is made up predominantly of thinly capitalized small businesses that lack the resources and expertise to cope with OSHA's complicated standard. Consequently, thousands of roofing workers may lose their jobs. Those roofing workers fortunate enough to keep their jobs or to find new jobs will quickly face increased safety and health hazards as a result of OSHA's respirator and protective clothing requirements which are part of the regulation.

NRCA asked for judicial review of the standard, and our message to OSHA is simple. Roofing workers can be fully protected against significant health risks in ACRM work by a regulation like EPA's which, number one, tightly focuses on only those relatively few jobs where significant fiber release is even possible; and two, imposes common-sense work practices and controls that are within the capabilities of typical roofing contractors. Requiring OSHA to comply with the Regulatory Flexibility Act of 1980 would go a long way to preventing arbitrary and burdensome regulations such as this asbestos standard from adversely impacting roofing companies and other small businesses.

In conclusion, OSHA's regulations are so difficult to understand that another Government agency, the Small Business Administration, has spent taxpayer money on an OSHA Handbook for Small Business, which is a publication that offers information on how to comply with Federal occupational safety and health laws.

Attached to our written testimony is an advertisement from the SBA publication which asks—the name of the publication is The Small Business Advocate, which asks the reader "Puzzled by OSHA Regulations?".

It is clear that even the Federal Government recognizes that OSHA's regulations are too complicated and that, as a result, small business people are facing exasperating compliance problems. The Regulatory Flexibility Act was intended, as I understand it, to prevent these excesses, and unfortunately, small businesses have little recourse when agencies arrive at absurd economic impact conclusions or proceed with rules even after concluding that there are marginal benefits.

Agencies are deliberately disregarding the letter and the intent of the law because it has no teeth. That is why strengthening the Regulatory Flexibility Act would be so helpful to me and to other small business owners.

NRCA strongly supports the provisions outlined in Title VI of the Job Creation and Wage Enhancement Act of 1995, H.R. 9, which strengthens the Regulatory Flexibility Act and would clarify procedures for judicial review of agency compliance.

I appreciate being able to testify. Thank you.

Chairwoman MEYERS. Thank you very much, Mr. Griffiths.

[Mr. Griffiths' statement may be found in the appendix.]

Chairwoman MEYERS. Mr. Carty.

TESTIMONY OF JAMES P. CARTY, VICE PRESIDENT—SMALL MANUFACTURERS, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. CARTY. Madam Chairman, thank you very much for allowing the National Association of Manufacturers the opportunity to appear before this committee and to testify on amending the Regulatory Flexibility Act.

NAM is the largest and oldest manufacturing trade association in the United States. We have 13,000 members; approximately 9,000 of those are small manufacturers. On average, the small manufacturer employs around 75 to 80 employees.

I have submitted a statement and I wish the statement to be included in the record at this time.

Chairwoman MEYERS. Without objection.

Mr. CARTY. The manufacturing community is probably one of the most heavily regulated business sectors in the United States, and small manufacturing members consistently over the years have complained about the number and the complexity of Federal regulations. This has continued to be a problem.

In the mid-1980's, they did see some relief in the regulatory flow; however, recently the flow has increased and it is becoming heavier. The regulations are more complex, more difficult to understand.

The manufacturing community has, as you know, made quite a turnaround in the last 10 years. It is more productive; it is probably one of the most productive manufacturing bases in the world. Our productivity is up. The quality of goods is also up. "Made in America" is now a proud standard. Our goods are exported all over the world and the small manufacturing community has played a role in that not only in the providing of parts to larger companies, but also in making goods that they export directly overseas and also which they sell here in the United States. But they tell me that they are not able to do the things that they need to do to become even more competitive—to lower their costs, expand their plants, hire more workers, and as a result, pay more taxes at the local level and at the Federal level. They are looking for relief, and they think that one of the major reliefs that can be placed in the Federal law is to allow judicial review of the failure of the Government agencies to live up to the letter of the law found in the Regulatory Flexibility Act.

Let me not go away from the subject without pointing out that it is not just the Federal agencies that my members criticize. They also criticize Congress. That is where all the laws and where all the regulations come from; so I think that when you are looking at the Regulatory Flexibility Act, you should also look at the laws that have been passed and the laws that you will pass in the future to make sure that you limit the impact upon the business community, because that's where the jobs are created, that's where the wealth is created.

Let me just give you some examples of the growth of Federal regulation. For 1994, the Federal Register was in excess of 68,000 pages. As was recently pointed out here, the regulatory agenda, which is the annual agenda put out by the Federal Government, ran over 1,600 pages. The small business community, the small manufacturing community has to live with those laws, so I think it is incumbent upon the regulatory agencies and Congress to make sure that the rules and regulations are understandable, not complex; and also they take cognizance of the burden that is being placed upon the business community and especially the small manufacturing community.

Let me give you an example of some of the inconsistencies that we have run into. Back in June 1994, the EPA came out with a regulation dealing with air pollutants in the area of aircraft maintenance. EPA, by its own statement, said it applied to 2,600 facilities. When we raised the fact that the EPA claimed that the Regulatory Flexibility Act did not apply, OIRA—we questioned that, Reg-Flex with OIRA, and they basically came back and said that is right.

We find it hard to believe that there are 2,600 facilities that are doing manufacturing—correction, that are doing aircraft maintenance and that none of them are small manufacturers or small business people, we find that hard to believe. Oh, there is hope. OIRA did take our criticism dealing with the Pension Benefit Guaranty Corporation where we raised concerns about the PBGC's proposals to satisfy debts of third-party contractors, small business people, doing business with the Federal Government by an administrative offset. This applied to all Government characters. We basi-

cally said, you can't be serious, PBGC, that it doesn't apply to small business; and OIRA backed us up on that.

Again, that is a little inconsistent—2,600, no, and an indeterminate number, yes. So, we think that judicial review is necessary.

We also think that an agency has to be put in charge of making sure that the other agencies are complying with the Regulatory Flexibility Act—maybe it is SBA; I don't know—because I know one of the criticisms and one of the complaints is that, well, you will have the small business community taking the Government to court every single day. Well, if you have an agency that is charged with making sure that the other agencies live up to the law, you will have less of that. So, that is our recommendation.

I would also like to point out an agency that is at least attempting to do a good job. The Federal Trade Commission is reviewing some of its past regulations and has put in the Federal Register a detailed statement asking specific questions of the small business community as to the effects of regulation on the small business community. I would be very happy to share this with you. I have shared it with OIRA and I have asked that they require all the other agencies to do what the FTC has done.

Thank you very much.

Chairwoman MEYERS. Thank you, Mr. Carty.

[Mr. Carty's statement may be found in the appendix.]

Chairwoman MEYERS. Mr. Pool.

TESTIMONY OF ROBERT POOL, HOMESTYLE PUBLISHING, EDINA, MINNESOTA, ON BEHALF OF THE NATIONAL ASSOCIATION FOR THE SELF-EMPLOYED

Mr. POOL. Madam Chair and members of the House Small Business Committee, thank you for inviting me to testify today. My name is Robert Pool, and I am past president and a member of the board of directors of a small company called Homestyle Publishing and Marketing. The company employs about 50 full-time persons, and we publish a catalog for sale which offers home plans so that you can build your own house and if anyone would like to have this copy, it will be right here on the table.

I am testifying today for the National Association of the Self-Employed, and I am here in my capacity as a member of the Association's Board of Directors. The NASE represents over 300,000 small business persons throughout the United States. Over 85 percent of the NASE members are business owners with five or fewer employees. We represent the smallest of the small in the business community.

On behalf of the NASE, I am pleased to address the Regulatory Flexibility Act of 1980. The NASE is one of the founding groups of the Regulatory Flexibility Act Coalition, a proud coalition of 57 small business and small Government agencies. As a small business person and a member of the NASE board, I am very familiar with the harmful impact—that the regulations can have on the ability of a small business to prosper in today's economy. For this reason, we commend the Small Business Committee for holding this hearing on the regulatory flexibility reform provisions of H.R. 9, the Job Creation and Wage Enhancement Act of 1995.

This proposal shows a bit of compassion for the little guy, the person who fixes your car or the person who paints your house, and these people need love also.

These provisions are identical to H.R. 830. The bill was introduced in the last Congress. Among other reform measures, H.R. 9 provided for judicial review of the Regulatory Flexibility Act. We were pleased when the Clinton administration lent its support last year to strengthening the RFA, as well as Vice President Gore in his Reinventing Government task force.

The Regulatory Flexibility Act directs the drafters of regulations to reflect on the impact that their proposed rules may have on the small entities. This is particularly important when taking into account the study released by the Small Business Administration. This study suggests that, on average, small businesses pay three times more per employee than big businesses to comply with the same regulations.

The Regulatory Flexibility Act is sound public policy. It is important to emphasize that small entities are generally not the source of the problems that an agency is trying to address.

Also the RFA takes into account that small entities are very often unaware of pending regulations. Even when small entities do comment on the proposed rules, they tend to do so without help from the kinds of attorneys, accountants, economists and compliance specialists that larger entities can afford to pay for.

Unlike the rest of the Administrative Procedure Act and, indeed, unlike virtually every other statute that agencies must observe, the RFA severely restricts the availability of judicial review. This has led to an apparent belief on the part of some agencies that compliance with the RFA is entirely voluntary and, indeed, it has really functioned that way in the past. The NASE believes that the threat of judicial review could vastly improve the seriousness with which the RFA is treated by the agencies that there—and thereby improving the efficiencies of the law.

Judicial review of the RFA is not likely to lead to excessive litigation or a clogging of the courts. Small businesses and Government simply do not have the time or the resources to sue Federal agencies over anything less than the most flagrant violations.

It is worth noting that even greater fears about excessive litigation were expressed when another small business-related law—the law was the Equal Access to Justice Act—was passed at about the same time that the RFA was passed.

When the Equal Access to Justice Act was enacted to simplify the award of attorneys' fees, a flood of lawsuits was expected, but that simply was not the case. It was originally estimated that the Equal Access to Justice cases would cost the Federal Government more than $100 million a year in legal fees, but in 1991, Federal agencies had a total caseload of over 390,000 cases. However, only 48 Equal Access to Justice applications were granted at a cost of some $433,000.

Of about 130,000 Federal civil cases tried under relevant statutes of that particular year, EAJA applications were granted in 253 cases at a total cost of $1.2 million.

Both figures, combined, are significantly lower than the national $100 million that was projected. Therefore, we believe that grant-

ing judicial review to the Reg-Flex Act would not result in an influx of lawsuits any more than we have right now.

In closing, I would like to thank this committee for the opportunity to testify today. My remarks have dealt with judicial review of the Regulatory Flexibility Act. However, the NASE also makes other meaningful recommendations concerning this act. For the record, these recommendations appear in my written submission to this committee.

I want to thank you very much for the opportunity to appear here and as the Scandinavians say in Minnesota, "Mungan tousand tuck."

Chairwoman MEYERS. Meaning?

Mr. POOL. Thank you very much.

Chairwoman MEYERS. We are glad to have you with us, Mr. Pool, and we will try to heed your admonition to love the self-employed.

[Mr. Pool's statement may be found in the appendix.]

Chairwoman MEYERS. Mr. Taddonio.

TESTIMONY OF LEE TADDONIO, VICE PRESIDENT, TEC/PENNSYLVANIA SMALL BUSINESS UNITED, PITTSBURGH, PENNSYLVANIA

Mr. TADDONIO. Madam Chairman and members of the committee, I would like to thank you very much for the opportunity to testify on this subject that is very important to all small businesses. My name is Lee Taddonio. I am vice president with the TEC/Pennsylvania Small Business United, a nonprofit association based in Pittsburgh, Pennsylvania. I am proud to be representing National Small Business United and TEC/Pennsylvania Small Business United at today's hearing.

I would first take this opportunity to thank you for being so helpful in the continuing search for solutions to the wide range of small business problems that we have here.

As you may well know, National Small Business United is the oldest association exclusively serving the small business community of our Nation—for over 50 years now. NSBU serves over 60,000 individual companies with members in each of the 50 States, as well as local State and regional organizations like the one I am with.

I am pleased to be here today to testify on the status of the Regulatory Flexibility Act, as well as to comment on provisions of H.R. 9, the Job Creation and Wage Enhancement Act which relates to the Regulatory Flexibility Act. This bill would strengthen the Regulatory Flexibility Act and help small business in a number of very important ways.

H.R. 9 would accomplish several important goals which the small business community has supported for a very long time. Most importantly, it would, one, allow judicial review of agencies' decisions. I think we have heard that a number of times today;

Second, take into account the indirect effects of regulation on small business;

Third, increase the role and authority of the Small Business Administration's Office of Advocacy in reviewing and improving regulations;

Fourth, create a role for the Office of Management and Budget to oversee proper implementation of the act. These are all very important steps, very helpful to small business, and we strongly endorse them.

First some background. After being a top recommendation of the first White House Conference on Small Business, the Regulatory Flexibility Act passed Congress in 1980 as a result of the realization that small businesses and large businesses often function in fundamentally different ways. They are so different, in fact, that regulations which treat them identically can be considered discriminatory toward small businesses.

With the passage of the Regulatory Flexibility Act, Congress firmly established the principle that small businesses are unique and that regulators would no longer pass rules and regulations without considering the effect on smaller businesses and considering less-burdensome alternatives.

Since its original passage, the act has also become an important model utilized by State governments as well. The obvious flaws in this process, however, which have led to problems in the past, are that it is the agencies' responsibility to decide whether the rule has a significant impact on small business, good or bad, and to perform the initial regulatory flexibility analysis to determine the extent of that impact.

The conclusions of the agencies regarding these matters are not always thoughtful and well documented; hence, the quality, utilization and recognition of the intent of the RFA is sporadic.

The Office of Advocacy within the Small Business Administration is charged under the Regulatory Flexibility Act with reviewing regulations for their impact on small business, but regulators are not required to abide by the SBA recommendations or to submit proposals for early review. Strengthening the hand of the Office of Advocacy is a key component to greater agency observation of this act.

Perhaps, more importantly, the act also does not provide for any judicial review and recourse in a situation where regulators have ignored the provisions of the RFA such as by falsely declaring that a rule would not have a significant impact on small business. H.R. 9 would change this scenario by allowing for full judicial review and challenges to agencies' interpretations of the act. If small business owners can bring suit against regulators who have ignored the act, the threat of such action will instill a new rigor in the regulatory process.

Reempowering the Office of Advocacy to file amicus briefs in appropriate case is also an important link to the judicial review chain. It should be clear that, especially without appropriate judicial review, the degree of implementation for the act would only be as high as the commitment the regulators have to it.

Just as an aside, to me it just makes my heart warm to think that there might be regulators having to go through the same thing our small business have to do, and I think that is why they are quaking in their boots when they see these proposals coming down the pike.

After more than a decade of the act in implementation, it has become clear it should be expanded in one more significant way. As currently written, the Regulatory Flexibility Act only affects those

regulations which have a direct impact on small business. Very often, however, some of the most devastating regulations are ones which affect businesses indirectly.

For example, regulations on insurance companies and health care providers could well impact the bottom line, either positively or negatively, of small businesses attempting to purchase and maintain health insurance. The indirect impact of such regulations, not specifically written for their compliance, should enter into the impact analysis of regulators. H.R. 9 would require such considerations, which would be a big step forward in the struggle against the adverse impact of Government on small business.

The Regulatory Flexibility Act has been an important tool for keeping the burdens of regulatory whimsy and misunderstanding from overly impacting small business. Under the act, the Federal regulatory process has evolved far beyond the frequent ill-consideration of previous years. Yet, more still needs to be done. The guiding principles behind the act are well defined. The problem remains in perfecting our tool for carrying out those principles. H.R. 9 is an important step in that direction.

National Small Business United appreciates the opportunity to testify before the committee today. We also wish to thank the committee for holding this hearing on a matter of such importance to small business. As this issue remains before the country and H.R. 9 moves its way through Congress, we stand ready to help in any way we can.

Thank you, Madam Chairman.

Chairwoman MEYERS. Thank you very much Mr. Taddonio.

[Mr. Taddonio's statement may be found in the appendix.]

Chairwoman MEYERS. I think we have had an excellent panel today.

It has been my practice to recognize those individuals in the order in which they arrived at the committee hearing, and I will do so today. I have been postponing my questions to the end, but today I would like to ask a question at the beginning because I think there was confusion generated about something that the Ranking Member said, and I would just like to make sure that I understand that.

So I am going to direct this to Mr. Glover.

My understanding is, Mr. Glover, that while section 4003 of H.R. 9—it does expand the Reg-Flex Act to require cost assessments of rules, no matter what size business it affects, but it does not expand the requirement for Reg-Flex analysis beyond small entities; therefore, if we pass judicial review for that analysis, we are not expanding it to large businesses, but it would still be analysis and court review for just small businesses.

Mr. GLOVER. That is certainly the general view of it, I would think, but I think you also need to be very careful that legislation that was specifically designed for small business not be diffused by looking at other issues. As you know, all interest groups, all parts of the economy don't necessarily support what's important for small business. Some clear economic historical patterns of discrimination and the economies of scale work against small business.

We know then, when we pass legislation, we are not sure what the courts are going to do with it or how they are going to interpret

it. The provision you mention in H.R. 4003 does tend to taint the cleanness of the underlying purposes for the legislation I would be very cautious about that.

I think the Regulatory Flexibility Act has a good record. It was well intentioned and it csould work. It needs to be improved; it needs to have teeth put into it. But when you defuse it, I don't know where the courts are going to come down. I would urge you not to include that provision with the rest of the Regulatory Flexibility Act.

Chairwoman MEYERS. All right. I am glad to get your interpretation of that. I will certainly discuss it with the Chairman of the Judiciary Committee. I do not know whether he has had his hearings yet or not, so I will talk about it with him.

Mr. Bartlett.

Mr. BARTLETT. Thank you, Madam Chairman, for convening this hearing and thank all of you who have provided your testimony.

In the real world, I was for a number of years a small businessman and I felt all the while you were talking that I might have wished to join you on that side of the table. Something that struck me in your testimony was that there is a kind of resignation that these excessive regulations are a permanent fixture and the best that we can do is find some way of surviving as a business in spite of these excessive regulations.

I was pleased, Mr. Carty, that you suggested that we might not need all of the regulations that we have. I think that the best source of really good regulations comes from the industries that are being regulated. When a roof leaks, the persons who are hurt most by the leaking roof are those who put it on. When somebody falls off of a roof, the people who are hurt most by that are the roofing contractors. I think the best source of effective regulations is the industry itself.

Do the rest of you share Mr. Carty's conviction that we may, in fact, have more regulations than we need?

Mr. FARIS. How loud of an amen do you need? We have never met a regulation we have adored. We concur that there are absolutely too many. Our focus today was to be sure in Reg-Flex that we get a chance to put some teeth into some things that are supposed to be law already, to give us some relief; but we would like to have a lot more relief, that is for sure.

Mr. BARTLETT. All we have been talking about today is trying to find a way of surviving in spite of these regulations to require enforcement of the Regulatory Flexibility Act, to require judicial review to make sure that they are doing what the—apparently, a number of the agencies now just flat out ignore this legislation. I would encourage you to be bold and to suggest that we don't need a great many of these regulations to begin with, so that we don't need to find ways of surviving in spite of the regulation.

Mr. GRIFFITHS. Congressman, as a small businessman, I am convinced that I am not in the office more than 5 minutes before I have violated some regulation—some obscure regulation that I don't even know exists. It is an overwhelming—it is an overwhelming fear that we have because regulations are so pervasive and so hard to understand that I am sure most businesses feel the same way.

The other thing that I have noticed, being in business and being confronted with overwhelming regulations, is that it has created a tremendous black market, especially in my business where my costs to comply with the regulations are very, very high; and many people, understanding that they can get around that just by doing business on a cash basis, can avoid most of these regulations, so that I find that a portion of my competition is growing almost exponentially.

Mr. BARTLETT. I think that our regulations are somewhat akin to the situation where, if you are treating a patient, the treatment is worse than the disease. Thank you very much for your testimony. I am sorry I need to leave and can't be with you, but we have got the message that you need relief from the regulations that are there and you would really like us to go back and look to see how many of the fundamental regulations need to be there.

By the way, none of these were ill-proposed by the Congress and they all were meant to meet a need, but we never go back and do a cost-benefit analysis to make sure that the treatment is not worse than the disease, and we desperately need to do that all across the board.

Thank you again for your testimony. Thank you.

Chairwoman MEYERS. Thank you.

Mr. Poshard.

Mr. POSHARD. Madam Chairman, thank you. I don't think there is going to be probably anybody on this committee who will disagree with the need for judicial review of the Reg-Flex Act and coming into compliance with that, particularly from the point of view of the burdensome paperwork and the obvious discrimination toward small businesses with respect to Government procurement and those kinds of things.

I think we generally, most all of us, are supportive of that and feel the small business community deserves that, but I just want to make a couple of comments on some of the things that I have listened to.

I heard one gentleman say quite emphatically, get Government off our backs, out of our pockets and off our land; and another gentleman said, quite frankly, our membership blames Congress for a lot of what is going on here, and so on. I want to drift a little bit from small business here, but then small business, under Federal law, includes some quite large businesses with respect to small industry and so on, quite a few employees. I have been privileged to serve with some regional economic development groups over the past many years, and I am just want to put this in a little perspective and ask you folks to try to keep some things in perspective. So, my comments are more of a statement than a question.

But right now where I live, if a small industry, or what we would term "a small business," maybe 4,050 employees or so, wants to move into our area, first thing they come and do is ask for a lot of free stuff. They ask the local governments for free land. They want tax abatements to move into our business parks and industrial parks, and generally that is for 10 years or better if you are going to be competitive with the neighboring communities down the road that they are pitching to also.

They are eligible for Department of Commerce grants to help build the infrastructure into their businesses, to help, in fact, build buildings themselves in many cases. They are eligible for training funds to train their workers for 6 months at a time on whatever technology comes into the buildings and they are also eligible and asking for money to help locate the technology.

Now we are establishing enterprise zones all over the place and give sales tax relief for the purchase of machinery, equipment and other kinds of things, materials that they use and that is always good Government. You never hear anybody complain about any of that stuff. Government is right there; everybody is asking for it. But, boy, I will tell you, the minute you start talking about any kind of regulation, whether it is safety in the plant or notifying employees that you are looking for greener pastures and you may close the door in 6 months' time down the road or something, it is always Government interference.

Now it seems to me that we ought to be fair about this. I mean, really. Everybody wants to blame Government for everything today, as if we are some almost criminal element out here trying to make people's lives more difficult; and yet, everybody wants Government to do all these other things for them. They are quite willing to take everything on the front end, but on the back end if something goes wrong, it is always Government's fault. Frankly, I get a little tired of that because you think there ought to be a talent here and I think we ought to keep it in perspective.

Government has done a lot of things that are good for small business too, and yes, we need to modify and change as we go along. But, gosh, I had the opportunity last year to talk with some small business people from several different countries; and I think if you keep it in perspective and look at the relationship Government has with small business in this country, on balance, it is pretty darn good compared to a lot of other countries in the world.

I heard people in the small business community talk to me about the incredible costs for mandatory health care for employees, for taxes that are going through the ceiling, for building codes that they have to comply with, which are outrageous, for having to pay people under the table to get anything done with respect to getting attention in the local Government officials, all kinds of things.

I think I am just preaching a little bit here, Madam Chairman, and I don't mean to, really, because I do appreciate the small business community and what they do for this country and I know 85 percent of our jobs are located there. But, gosh, I wish we could keep this thing in perspective a little bit because we want to help; and I think over the long haul we have done some really good things to help small business. But it seems like almost every time I go home and talk to the small business community, it is always just blaming Government for everything that is going wrong. So, I have said my piece.

Chairwoman MEYERS. Thank you, Mr. Poshard.

Would you like to respond to that?

Mr. FARIS. I think we—from your preaching altar here, I couldn't agree more, on balance. But the small business owners are on tiptoes with the water level above their nose, and they want some relief. They want it now; they don't want it in 5 years.

Our experience with small business owners in the NFIB is that they end up paying the taxes in the small communities to make up for the big companies that come in, that are given the land, and in some cases, relief from any utility payments. The small business owners pay the highest deposit on anything—they pay the highest utility rates, they pay the highest interest rates at the bank—and to say on balance they are demanding too much, we are a long way from that.

I would agree very much, and my counterparts that I visit with in other countries tell me that Mr. Reich is in the wrong direction when he is saying we should become more like Europe. The things you talk about hearing from people, small business owners around the world, are the same things they tell me.

Whether it is health care or taxes or the continuing burden, it is ridiculous. We do need to balance, no doubt about it, but the pendulum is so far over that the small business owner, the only thing they can do while they are choking is say, give me some air and that is what they are dying for.

We have a chance here to put some teeth in a regulation that would be fair to small business, so this is one piece we would like to go back and brag to the small business community on what their Government has done for them lately.

Chairwoman MEYERS. All right. Thank you very much.

Anybody else?

Mr. POSHARD. I don't have any problem with that, but I think at the same time we are acknowledging some need for relief, we ought to acknowledge the good things that Government has done along the way to help.

Chairwoman MEYERS. Would anyone else like to comment on this?

Mr. Taddonio.

Mr. TADDONIO. Thank you. I agree. I don't think we are asking for handouts or anything like that, and we don't contest the fact that we need to comply with everything that everybody else does, but there needs to be some rationale.

One of our member companies is a glass manufacturer and makes specialty glass, 110 employees; they have been around since the turn of the century, a very good firm. The things that have happened to them in the last few months has been ridiculous. They got an air pollution form that they had to fill out was about this thick. The very first question on there was the latitude and longitude of your company. Some of these things are ridiculous. Maybe if you are U.S. Steel or somebody like that, you can comply with their stuff. If you are a little guy—it took the President of this company, the President 1 month working on this himself that he couldn't devote to running his business.

Now this is the type of thing that we have got to find a solution to. We have got to make some kind of accommodation for the small business people who generate the jobs in this country. Who is doing this now? You know, it is us; and you are going to—unless there is something done, there are not going to be too many of us around anymore.

Chairwoman MEYERS. All right. If I can have the Chairman's prerogative here, I would like to make a comment; and that was

about, I believe it was Mr. Carty's comment that part of the responsibility lies with Congress and I really believe that is very much true.

When we passed something, Mr. Poshard, like section 89 and we said they had to even out the benefits on the health plans and then we didn't explain, I think, in that law exactly what we meant—and it was a very, very complex picture, and by the time the rules and regulations were drafted, I think it was 40 pages, single-spaced. Then Congress said, well, it is the fault of those darned bureaucrats. I don't think we can get rid of our responsibility quite that easily. I think when we draft a law that is that wide open and that vague, I don't think we can blame Federal employees entirely. Maybe that is what he meant and maybe it isn't; I don't know.

Mr. CARTY. Exactly.

Chairwoman MEYERS. We need to be more precise in what we are asking for, also.

Mr. Longley.

Mr. CARTY. Madam Chairman. When I started off in Federal Government, I worked for the Federal Trade Commission, so I was a bureaucrat. I then worked on the Senate side as a staffer for 3 years. Now I am with the NAM for the last 20 years and dealing with the manufacturing community, so I have seen this problem from all sides and it basically comes down to that the fact that Congress continually adds and adds and adds; they don't subtract.

The Government agencies are required by law to carry out what you tell them to do, and they are attempting to do that. There are rules on the books, the Paperwork Reduction Act, which you are going to have a hearing on in a couple of days. There is an Executive order, the Regulatory Flexibility Act. All of these acts and the Executive order require the Government agencies to go back and look at the regulations on the books, review them as to economic impact upon the economy, jobs, the business community, et cetera. The agencies can't do it. Because Congress keeps on piling on.

Please stop.

Chairwoman MEYERS. I do think that we need to be aware ourselves what we are doing, and I think we need to be more precise in the kinds of laws that we pass.

Mr. Longley.

Mr. LONGLEY. Thank you, Madam Chairman.

I am not going to tell you that business needs to be grateful for Government. I think, frankly, this Government owes a real debt of gratitude to the people in small business that are putting up with some of the nonsense that they are putting up with. I just want to add—maybe pick up on a comment that was just made, maybe a few minutes ago, that I would agree with the other Member's comment that no one believes that Government wants to make everyone's life more difficult, but it is real clear to me that we have reached a point where Government is attempting to just tell you how to run your business.

I want to ask a question relative to the Regulatory Flexibility Act, and I just want to interject, I don't know if the members of the panel have a copy of the letter addressed to Mr. Glover dated January 11th, 1995, but if the outline—and I assume, Mr. Glover, it is a memorandum of understanding?

Mr. GLOVER. Yes, it is.

Mr. LONGLEY. If this is an indication of how we are approaching regulatory flexibility, it certainly doesn't strike me that we are on the right track; and I want to just say, are we going far enough?

Yes, maybe it is a good thing to allow for judicial sanction or judicial options, but—and I agree with the other comment that was made relative to the fact that we have got to just start saying no, because I think there is a limit to what we are able to accomplish through regulation and there is a point at which we have to some trust and confidence in the ability of business people to make decisions that are in the best interests of their companies and the people who work for them.

Let me ask a question. Is there a way in which we can go farther than what we are proposing in this flexibility act?

Mr. GRIFFITHS. One way I think that we could go farther—and by the way, I would like to say that, as a businessman, this type of proposed legislation, this concern over the regulatory burden is very encouraging, and this direction seems to be an appropriate way to go where, if a cost-benefit analysis is done on regulations and a decision is made to either pass the regulation or to not accept new regulations based on that cost-benefit analysis, it seems to make an incredible amount of sense from a businessman's standpoint.

Businessmen are not looking to allocate blame to Congress or anybody. All we know is that we are just overwhelmed and this is the only bright light that I see on the horizon to help address the regulatory concerns that we have.

But how could it go farther? I think there has been some allusion to perhaps sunsetting some regulations that no longer are appropriate; and I am not sure, but maybe it would be appropriate in this legislation to also include a look every 10 years at all regulations to see what the cost-benefit analysis is—and to hopefully sunset some of these regulations that are very burdensome expense-wise, but just netting no results.

Chairwoman MEYERS. Thank you.

Mr. Peterson.

Mr. PETERSON. Thank you, Madam Chairman. I think this is an excellent hearing. All these items need to be aired.

But in a general perspective, let me just start out first and suggest that this shouldn't be a finger-pointing exercise. It should be, how do we perfect, how do we improve, how do we clarify, and then I think, how to revise; and one of the points that you have just made, which I had already had here, is how do we set up a system of sunsetting? There has to be, in my view, for any kind of regulation, a life, a term. I think that gets to some of the problems that you have all talked about, that we put these things on the book and then they sit there and languish; and then as you say, you go into your office on a given morning and you find that you have broken five regs on the way to the office.

I am a small business owner and have been for many years. I have problems and have always had problems and I continue to have problems because of what can I do and what can I not do, and then I get to the point here—and this is the question: I have prob-

lems with State and local, as well as Federal, and sometimes a small business man doesn't know the difference.

I would like, if you, anybody, can give me a perspective because—incidentally, small is not always small. Small is very small when you are talking about Mr. Pool's operation, perhaps, and then you have these other folks over here who in fact, have 150, 200 employees; that is not quite so small. I am—the people who are really hurting here are the small smalls. They just simply don't have the resources to do the research and then do the compliance.

But the point I want to make here is, give me a feel for how much of this is Federal and how much of this is State and local, so that we really can put a sense of magnitude over our task here.

Mr. FARIS. Madam Chairman, if I could respond to that.

Chairwoman MEYERS. Yes.

Mr. FARIS. We constantly go to our members—we have State directors in all 50 States and are very involved there, our members have told us that it is about 5,050. They think about 50 percent of their problems are State and local, 50 percent are Federal.

It is really interesting when you get west of the Mississippi; they are more concerned with State and local burdens because they feel more and more detached from the Federal Government, so where they are from Oregon or Washington, or wherever, there is a different feel.

But when the Government is here to help you, they don't take the time to try to label what part of the Government is. It is just, the Government is here again—another Manila envelope threatening fines and imprisonment.

So the balance we found, as small business owners like yourself, is about 50-50. God forbid I work on the State line, and you have business where people are in two different States; then you have all the different regulations to comply with, based on employees and where they live, and it just goes on and on.

So it is like the Chinese death of a thousand cuts, "I can't remember where the last one came from, but I didn't like it, and it is time to stop the bleeding," and that is what this legislation is about.

Mr. PETERSON. I appreciate that, and I think that in our search here for solutions that there have been some very good recommendations being made here. But then, as in the impact of all of what we are trying to do, we have ultimately got to get down to some surgical repair. The broad "let's go hit them with a sledgehammer in this category" just will not work and so we will, I think, have to prioritize.

I think the initial review that everyone has talked about here is something clearly lacking. I would also wonder out loud, if here is the role of the SBA, and it is sort of acting as shepherd or policeman on behalf of small business to help keep the other agencies honest in this approach, and if that is the way it is looked at at the agency.

Mr. GLOVER. It is very much so, and we spend a good bit of our time looking at agency regulations, going to those agencies, and filing comments. We have been fortunate to be able to go to the White House; we have been able to join with the Administrator when we found recalcitrant agencies who seem to avoid the Regu-

latory Flexibility Act. They do that in several ways, but the most common is to simply certify it doesn't affect small business when they and we both know that it does.

We have been able to make some significant improvements, but I will tell you that I am supportive of the legislation not because I don't think we can literally wrestle most every reg to the ground and prevail, but that the same players won't always be in the same place. We won't have the same team at OIRA. We won't have the same president or the same Administrator necessarily. There are some agencies, no matter what any of us do, that simply choose to ignore the act.

The Agricultural Marketing Service has simply ignored the Regulatory Flexibility Act with impunity and continues to do so. Nothing we say or anybody else will say is going to make them change the way they write their regulations; they are simply going to ignore us. That is why it is necessary to have judicial review.

Hopefully, those agencies will recognize that someone will look over their shoulder; and while I would like to think that the chief counsel for Advocacy, the Administrator of the SBA, or even the head of OIRA has real clout, Our clout is nothing like that of a Federal judge that says, you do this or you go to jail.

Mr. PETERSON. You made a beautiful case for the judicial review, I think, and it sounds like the Government just made that statement. Aren't you the Government?

Mr. GLOVER. Yes, sir.

Mr. PETERSON. So it sounds like we are in unison on this point, so that is where we are.

I will just close. I don't want to use all the time here, but my heart is for the little of the little, the small of the small. The other folks can hire lawyers that can do their thing. It is the little guy who is really in trouble and he is the one who is taking the greatest risk actually, in a large sense; and so I would hope that we can look at this responsibly and take advantage of these hearings and look to the opportunity to improve this act, as opposed to try to squash.

Let's perfect, clarify, and improve.

You wanted to say something?

Mr. GRIFFITHS. Yes, Congressman, if I could just touch a little bit on the relationship between State and local regulations versus Federal regulations.

I am from New York State, which means that I think that we were—we have many other State and local regulations that we have to comply with, other than Federal regulations, but I think it should be noted, the importance of Federal regulations being used as a model for State regulations; and in that regard, I talked about asbestos earlier.

Our State regulated asbestos in a very similar manner to the way the Federal Government was regulating asbestos, except our State felt that if one-tenth of a fiber was allowed by the Federal Government, then they were going to only allow one-hundredth of a fiber because one-hundredth of a fiber exposure has got to be better than one-tenth of a fiber. Nevertheless, we have no test methods to measure quantities as low as one-hundredth of a fiber in New York State.

But I do want to stress the importance of Federal regulations. DOT regulations are another example of State enforcement of Federal DOT regs. The environmental regulations, DEC regs are modeled in many cases after the Fed regs, and I am excited that New York State currently is setting up a task force under the new Governor to address the regulation issue, and I am hoping that they will be able to use as a model what is being done here, now, as we speak.

Mr. PETERSON. I can appreciate your notation. I spent a number of years in the military and you know what the general said, and then by the time it got to the private, it was quite different; and I clearly think they are being used in that way.

Thank you, Madam Chair.

Chairwoman MEYERS. Thank you very much, Mr. Peterson.

Mr. Wamp.

Mr. WAMP. Thank you, Madam Chairman. One thing I have learned since I got here a few weeks ago is that regardless of how much we disagree on certain issues, there is a respect in this institution which I very much appreciate. I am sure that as the days go by, my ability to maintain that composure at times will grow, and with all due respect to the gentleman from the other side who spoke earlier to the role of the Federal Government, I want to remind everyone on the record that Thomas Jefferson once said, "A wise and frugal Government will restrain men from injuring one another, but shall leave them otherwise free to regulate their own pursuits of industry and improvement." We must remember that, and I think that is one reason I am serving on this committee and, I am sure, why you came to testify today as well.

A few other things I would like to state before I ask a question. One is that "profit" is a good word; "greed" is a bad word. Capitalism works and socialism does not work. When you compare our regulations to other nations', it is like comparing yourself to a train that is going in the ditch. We can't do that. I mean, this Nation still is a free market economy and must remain so; and I don't think it is wise to start looking around and saying, but we have got it better than other nations. That doesn't mean we have got it as good as we used to have it or have got it as good as we can get it.

I do believe that we have a condition of overregulation in this country. I am from Chattanooga, Tennessee, where we had an air pollution control problem 30 years ago, 25 years ago. We were on the dirty air list; now we are on the clean air list. I can tell you that the private sector and our industrial leaders in the past cooperated in a way that allowed a balance of regulation. We did it, though, through a partnership; we did not do it through overregulation.

I went through plenty of facilities in the last 4 years on the campaign trail where people would say, we are proud of our house, we are proud that this is here, but you go a step further, and we close our doors. That is the point where we are in America, but I just couldn't help think, when I heard those comments—I had some people in my office just an hour ago from a quasi-governmental agency, that were complaining about the Davis-Bacon Act; and we are at a point now where even quasi-governmental entities are

overregulated, and you would think that those that are dispensing the Federal dollars wouldn't have the same problem as total capitalist enterprises out there, but they are experiencing it as well.

I won't go on, but I will ask this question, because I really do believe we could talk the rest of the day about this. Workmen's comp or workplace regulations, clearly, it seems to me, if you are honest about what is going on out there, are now causing small business people to not comply. I mean, workmen's comp in the construction industry is circumvented at every corner.

I would like some commentary on what your membership says, when polled, or what they say to the leadership about how tempting it is to just not comply, which causes another whole set of problems.

Another thing I learned along the way is, whenever we pass a law, you had better be prepared to deal with whatever it causes, because you pass a law to solve a problem and it causes another whole set of problems; and it seems to me that a lot of our regulations are causing a nightmare, a follow-up to try to figure out how everybody is getting around these laws that never should have been passed to begin with.

Mr. FARIS. I am picking up something you said earlier about the sun setting that would fit here, too; and that is, if we would sun set laws, or we do like businesses do—and that is that we test things before we put them in forever; and that is the Government, when we pass rules, we test those to see, and then have an automatic time to come back and have to prove whether or not we keep it. You don't have to prove that we don't need it, but prove we still have to keep it.

What has happened in Canada when they had tremendous tax changes that were very harmful to the smallest of small businesses, my counterpart there tells me that the estimation of "gray market"—the estimation no one can tell you for sure because it is gray—has gone from 7 or 8 percent up to about 28 percent. That means those tax dollar revenues are being lost. What is so sad is, it takes people who are honest, law-abiding people who are trying to survive, who may have one or two employees, who may have the same last name, and their own Government is putting them in a situation where, to comply, "I will have to go out of business."

Now that is not a fair thing to put people in that situation. I think what we are hearing from across the country—like Hixson, Tennessee, we hear it from all over, that we have had enough. It is time to put a moratorium in. It is time for us to have more time to consider things like the Federal Register, which many small business owners, I know, aren't perusing these too closely—to be able to do something with Reg-Flex to put teeth into it, so we can at least make sure that the law put on the books in the 1980's is lived up to. To me, that is the bottom line for us.

I think we all agree on the subject at hand, in general. It is a matter of what teeth and how sharp those teeth are.

Mr. WAMP. Thirty-second follow-up. I left Hixson, Tennessee at 6 o'clock this morning, so thanks for the plug. Also Anderson County in my district, the oldest manufacturer in Anderson County, who makes radiator components for certain automobiles, said that with today's regulations there is no way that they could go into the busi-

ness that they are in now; and they have been—they are the oldest manufacturer in that county. I think that is a sad state of affairs. We are not even allowing risk-takers to fulfill the American dream because they are looking at the playing field and saying, no way I can get to first base. That is a shame, and we have got to roll it back; and we can't continue to make excuses for this Government and I, for, one, am here to apologize and to say that I hope there is enough of us to try to do something about it.

Chairwoman MEYERS. Mr. Wyden.

Mr. WYDEN. Thank you, Madam Chair. Madam Chair I want to commend you for a very important hearing and an excellent panel of witnesses.

Gentlemen, let me first say that I think you are going to see clear bipartisan agreement on the vast majority of this proposed law and in this debate, and I think clearly we all feel that strengthening and enforcing the Regulatory Flexibility Act is, in effect, the first line of defense against bureaucratic water torture.

We hear about that from our constituents; we hear about it whether it is in Tennessee or Florida or anywhere else. I think that what we need to do to really use our time well is to go to one or two of these issues that I think are right at of the heart of some of areas, that we do need to try to resolve this on a bipartisan basis. Let me ask you about the one I think that concerns me the most.

It seems to me that businesses of all sizes have hassles with the bureaucracy, no question about that, but I think it has been the view of the Congress that it was good public policy, in effect, to set up what amounts to a special HOV lane for small businesses. That is what we have really been trying to do all these years with all this thrashing about.

Now, in the Contract With America, what is essentially proposed is to throw the HOV lane open to everybody not just small businesses, but to everybody.

Now, let me stipulate again that big businesses have problems with bureaucracy as well.

I am concerned that if we rewrite the Contract With America to change the Regulatory Flexibility law so that all businesses go into that HOV lane, that is going to clog things up for the small businesses and, if nothing else, there is going to be a resources problem. There is going to be a resources problem in Government to do what I think is most important, which is to champion the concerns of small business.

So I would like to hear first from Mr. Glover and then to go right down the line to hear from each of you on the specific point of giving up the special HOV lane for small business; and I want it understood that in an ideal world, as I think one of our witnesses said, there are loads of problems for big businesses with bureaucracy.

So this is not an anti-big-business argument; this is a resources debate. This is a question of, you are trying to balance the budget, hold down the deficit. Are you in effect, going to open up that HOV lane and what are the implications?

Why don't we start with you, Mr. Glover.

Mr. GLOVER. I think we need to look first at the Regulatory Flexibility Act where the underlying idea was that because small businesses don't have the same resources as larger businesses, that Government should make a special effort to analyze the impact of regulation on small business. In some situations small business compliance with regulatiors does not have an enormous impact. You can, for example, exempt 20 percent of the businesses out there and have virtually no effect on the quantity of pollution that has been put into the environment or anything else.

So, clearly, to lose that preference which was based on sound public policy and economic analysis, to let other people into that preference, clearly runs the risk of losing that preference for small business.

Let's simply be very candid about it. There are thousands of lobbyists and economists and consultants in town that represent big business, and any time there is a way for them to do anything, they are right there knocking at the door.

Small business doesn't have those resources. You have got some individuals, a few associations that try to fully represent small business, but by and large, small business doesn't have the resources to make their voice heard. I will tell you quite frankly, that many large firms have far more lobbyists in Washington than any small business organization, and probably more than all of them put together.

There is a clear public policy needed to do something special for small business. When you allow large firms into that pot, you lose the public policy need, and small business gets lost in the shuffle. I think you are absolutely correct.

Mr. WYDEN. Let me see if we can go right down the line before I ask one other question of the Chair.

Mr. FARIS. Very quickly. Very different from the health care debate; I think we have got a lot more unanimity of agreement.

We don't want to get bogged down on different details that aren't at the core—what we have seen in this HOV lane is, any time we can stop regulations that are being put into place across the board in all size businesses and at least look at those as I understand it—I may not have the correct information here, Congressman, but my understanding is, the right of a judicial review, i.e., to go to court, is still held for the small business not the big business.

Is that an accurate statement? Is that accurate?

Chairwoman MEYERS. I believe that is correct.

Mr. FARIS. That is what we understand section 4003 to be, is to be different and to look at it for all business; and number two, when it comes to going to court.

But what we do know is, everyone here, from elections past, and the health care debate—the power of small business is not in the Gucci loafers in the halls of Congress; the power of small business is on Main Street. We have over 1,240 members per district and they have learned in health care, they learned in the last election that they can rise up and speak. What we are saying in terms of big/small is that more regulation on big business ends up being paid for by everybody. Business doesn't pay for it; customers pay for it and employees pay for it.

Mr. WYDEN. You don't have any quarrel with me on that. There are no free goods or services.

The question is whether Mr. Glover is going to do all these cost analyses for all size businesses or whether he is going to be able to do them just for the smalls who really don't have anybody. I think that what we ought to probably be doing is having businesses—and my colleague from Tennessee gave a very good example—businesses that are larger probably ought to come directly to people like us. It is our job to figure out a way to move it through the bureaucracy, and if resources are scarce, they will tell people like Mr. Glover, who is on the front lines with a title for small business, to keep the HOV there.

I am not of one mind on this subject, but I think that because time is short, if each of you could just tell us, are you prepared to give up what amounts to a special preference for small business?

Mr. GRIFFITHS. I guess the best way I can respond to the question is to use the highway analogy; and as a small businessman, I don't think I am in the HOV. I feel like I am running on three cylinders and limping along on the shoulder.

Again using that analogy, I look at big business and small business on that highway, and I look at regulations, at what has been reduced from a 70-mile-an-hour highway to a speed limit of maybe 10 to 15 miles an hour.

In looking at small-business versus large-business regulations, I think the whole regulation picture has to be looked at.

Mr. WYDEN. When you go back and look at my words, I said a strengthened and enforced Regulatory Flexibility Act is the first line of defense. Nobody is saying it is a perfect statute. The question is whether you want to replace the theory, and that is what I am concerned about.

Mr. Carty.

Mr. CARTY. I think Congress should be concerned about the cost of the regulation on the economy. That is a brake upon the economy. The brake affects large and small businesses alike to different degrees, I suggest. However, it is a brake upon the economy; jobs aren't created, goods are not exported.

Mr. WYDEN. I guess I don't disagree with anything that any of you have said. We want to know whether you want to give up that special preference.

Mr. Pool.

Mr. POOL. I don't feel we would be giving up that special preference. I am not following your reasoning on that. I think that if the law is drafted as we have discussed it today, that maybe we are broadening it, but we are not losing it.

Mr. TADDONIO. I think there are really two issues here. One is whether regulation itself should be in place. The other is should there be some kind of consideration for small business.

Certainly we would like to have some kind of consideration for small business if the regulation has to be in place. I think that is the situation and if there are regulations that generally might trickle down to small businesses, they should be looked at from the small business angle, from the standpoint of this type of legislation. But I think the other issue, we were concerned about that as well, yes, and we don't want to make that—minimize that either.

Mr. WYDEN. Fair enough, and I want to be clear. I don't want to minimize the overregulation in our society, as well. There are no free goods and services. It all takes a toll on the economy.

What I am concerned about, and I think you touched on it, Mr. Taddonio, that if we give up what was the theory of what we wanted years ago, although the hope was obviously not realized, I think we may end up creating a situation where you clog the HOV lane and you don't even get the progress for small business.

I guess my question to you, Madam Chair, do you anticipate that our subcommittee will be able to get legislative jurisdiction over this aspect of the contract, Title IV, so we can get into this debate?

Chairwoman MEYERS. This committee has sequential jurisdiction following the Judiciary Committee, and we have said that during the first 100 days, because the contract puts such constraints on us as far as time, that these hearings would be held in full committee, and that is just for the contract items. This doesn't mean that we couldn't get the subcommittees together to review or further discuss, but the hearings are being held in full committee and it seemed to us that there was just so much to do that maybe the subcommittees would not have an opportunity.

I certainly don't want to deny the subcommittees an opportunity.

Mr. WYDEN. I only bring it up because I think on the minority side, we feel that it is extremely important that this committee have jurisdiction over this title and I think all our witnesses on this point made a very good argument on their side with respect to the fact that dumb regulation takes a toll in the entire economy, no quarrel from people on our side.

The question is going to be, is that the best use of scarce resources, and I happen to think that trying to keep the HOV lane clear for small business and doing the job properly so you don't have the kind of thing Mr. Griffiths talked about is what is in the public interest, but we are anxious to continue the debate and I thank you, Madam Chair.

Chairwoman MEYERS. Thank you, Mr. Wyden.

I think we would undoubtedly have first jurisdiction on this if it were not for the fact that we were asking for judicial review. Since that has been the thrust of the bill in past years, first jurisdiction has gone to the Judiciary Committee, but I am working well with Chairman Hyde.

Mr. Chrysler.

Mr. CHRYSLER. Thank you, Madam Chairman. Certainly I could have said my story from that table for the last 25 years, and by the way, I have only heard about HOV lanes for the last 2 weeks. I never knew what those were until I came to Washington.

But talking about this regulation there is $500 billion worth of regulations that are put on American businesses and it makes us totally uncompetitive with the rest of the world, and certainly the regulation that is forced onto business by Government makes it noncompetitive. Even in our own country in a large business it is easier to absorb the cost of regulation than in a small business, so it means a large business has a much more competitive advantage over a smaller business in dealing the same industry.

How much of an advantage do you think that is?

Mr. FARIS. Advantage in the small and large? Well, it is a huge advantage when you add all the things that were brought up earlier that I heard said small business is taken advantage, but it is really the larger businesses that get the opportunities. It has to do with utility rates, interest rates, everything paid is higher. We pay more for product because we purchase fewer at the same time. We are having to compete for people in a market who may prefer the stability that they think they would get with a larger firm.

So, yes, indeed the cost of the product goes up and so we are dealing with a situation where we are trying to render personal service, as you would in your business in Michigan and other members are trying to do to make up for some of that, but when the price differential gets so great because of some of these cost factors—I even heard a representative from a motor company the other day, in fact, Chrysler Motors, if I might, who thought they were a small business. When you look at regulation that Ford and General Motors had per unit of production as to Chrysler, and I thought it was kind of interesting that Chrysler thought they were a small business. But it does, it adds tremendous amount and it causes you to say, why should I be in this business in the first place. My Government ought to be helping me, not hurting me, and that is why this regulation change is so important.

Mr. CHRYSLER. I agree with that. In the early 1980's I think we saw Chrysler go through a process because that regulation kept on piling up on, say, a million units a year where General Motors had 6 million units a year to amortize those costs over. I think finally in the early 1980's, Chrysler just kind of regurgitated all of that and we went through some pretty tough times in Detroit with that and here in Washington as I recall.

Mr. GRIFFITHS. I guess one way I could respond to that is that I notice, as a small businessman, that I am spending more and more time each year trying to make sure that our company is complying with regulations, as best we can, and I have noticed that my time has increased again exponentially to, number one, trying to understand the regulations and number two, then trying to comply with those regulations as best I can.

A large business, I think, can afford to have maybe a full-time person to help understand and comply with regulations, where as small businesses are just at a loss to try to come up with the manpower to understand and comply with the regulations.

Chairwoman MEYERS. Thank you very much, Mr. Chrysler.

Mr. Sisisky. I would like to mention, Mr. Sisisky has been very involved with regulations and paperwork over the years and efforts to try to reduce it.

Mr. SISISKY. Thank you. That is very kind of you to say that.

I just want to come back to what Mr. Poshard was saying just to take him up a little bit, Mr. Carty, where you said it is the Congress' fault. It just struck me that President Bush made a statement one time and he said, no net loss on wetlands, and the next thing we knew, without anybody looking in the Federal Register, the bureaucrats wrote rules that almost killed us with wetlands, if you know what I mean. I mean, absolutely almost killed us.

Congress makes a lot of mistakes but I promise you the bureaucrats write rules that we haven't even thought of, but that is an-

other subject. I just wanted to take up that a little bit. I am concerned.

Chairwoman MEYERS. Mr. Sisisky, Pat Roberts said they have defined wetlands so that an area would be called a wetland that no self-respecting duck would land in.

Mr. SISISKY. Well, I have one community, believe it or not, that overnight, after the regulations came out, 80 percent of the land was—I swear to you, 80 percent of the land was declared wetlands and I used this committee to have the first hearing on wetlands because everybody was afraid of the environmentalists. I just had the hearing myself.

I was concerned when you just brought up about the large business, and I want you, before we mark up and—to think about it again and come back if you see it as a problem. It could be a problem and I think you need to think it through.

I understand what you said that it wouldn't be, but I think that may be one area that we may have some disagreement on and I really, after you think about it, just come back, and I am going to tell you something, Mr. Glover, you really scared the hell out of me. You know, I got the Ways and Means Committee 3 or 4 years ago to quietly slip in the Internal Revenue into the Regulatory Flexibility Act.

We really had problems and you still got problems. They have found a way around it and you are telling me that the Department of Agriculture just absolutely ignores, I think you said, no one will pay attention to anyone. Who in the hell is the boss down there? Somebody is somebody's boss and if they don't pay attention there, then you got to bring it to us and let us try to do something. I mean, for an agency of this Government to ignore the law, and we are letting it happen, it is crazy.

Mr. FARIS. That is why we want to have them to appear before a Federal judge. Normally they don't ever hear small businesses——

Mr. SISISKY. Let me just tell you this. That is my next question. Are we going far enough going before a Federal judge? I want to tell you something. People have learned a lot of tricks of how to do it. In dealing with the agencies of Government on behalf of my constituents, I find they know how to dot the "I's" and cross the "T's" pretty good, and I guess they have plenty of time to do it, but they learn how to do it there and I am just wondering, have you looked at the bill even more so than judicial review?

What can we do? Some of these things are cultural problems that people just do not want to change. I looked at—we had a massive rewrite of Federal procurement laws. It seemed to go over everybody's head last year but it is an unbelievable thing that this Congress did, believe it or not, in rewriting the Federal procurement laws, particularly as it relates to the Department of Defense, which I am involved in, but we did the whole Government.

But yet, I am hearing reports back that we are having cultural problems. These people can't do business another way, and I am worried about this. These people who keep ignoring will do the same damn thing. How can we make it tougher? I want to make it as tough as we can get it so they will not ignore us.

Mr. GLOVER. Well, there is one extra little thing you need to keep in the back of your mind. If there is judicial review and the small business files the action, unless the agency was substantially justified, the Equal Access to Justice Act kicks in and allows small businesses to be reimbursed for legal expenses. One of the beauties of the Equal Access to Justice Act is that fees come out of the agency's general budget. Not only do they lose the lawsuit, they lose the money for the lawyer on the other side.

Now, the Equal Access to Justice Act is something you put in the back of your mind because it allows legal fees to be raised from $75 an hour. This amount was fine in 1980 when it was passed, but it has not kept up with inflation.

The when we filed notice with the court that said we were going to file an amicus brief, we saw how much the agency did to change things and how fast they did it. This indicates how much they fear going to court and how much they fear just having the Office of Advocacy weigh in on the other side of a rule. Bsed on this we believe they are afraid of judicial review. And I think it will be a culture change.

We have already talked with OIRA at OMB and we are going to make sure that we do one heck of a training program. We will really beat up on the Government agencies to make sure they understand it is a culture change, but in case they forget Equal Access to Justice is going to help hit them where it hurts, which is in the budget.

Mr. SISISKY. Is your staff large enough to do that? Do you have enough people to do it?

Mr. GLOVER. We have enough if our theory is correct that we have got to take a few cases and win them. We have the resources to do the amicus briefs, but where there may have a problem when small businesses don't have an association or organization like those represented today who can go in and file the initial lawsuit.

In those cases we can help to some extent in the Office of Advocacy, but if the agencies stonewall us, just like they have in some cases now, we wouldn't have the resources. However, I don't think they will. I certainly don't believe so because I have heard from the Vice President and the President, Deputy Chief of Staff, that everyone is basically committed to strongly enforcing the Regulatory Flexibility Act.

Mr. SISISKY. I am delighted to hear that and I would hope that the representatives of the small business community will let us know if it is not happening. You take for granted that we know everything. I promise you that is not true.

Mr. FARIS. Congressman, you were talking about small and large business. When you started off you were small and you later on became very big business in your community.

Mr. SISISKY. I was still small. I just made a lot of money.

Mr. FARIS. Compared to Pepsi, you were small, right? But what we have seen over and over again is that well-meaning, well-intended people who come representing their districts that pass laws that sounds like this would really be good, then pass it along and then the details are worked out by people who are in the civil service. You want to talk about a boss.

Personal example. Friend of mine became Assistant Secretary of Commerce for Administration, 9,200 employees. She decided she could run it on 5,000 or fewer employees. We went over the organizational chart. It made sense. It made sense, so much duplication of effort that left when they didn't have computers. They still had people three layers down.

A month later she said, I am going to move forward on this. She called me a month later. I knew the Secretary of Commerce would support her in what she was doing. She said, I can hire and fire seven people. Now, the real problem is that we have got to go back to the head of the stream and that is what this is about.

If you don't ever pass the reg, the rule, then nobody is turned open to build on it because they get a better job by having more employees, by having more fines, and having more work, so it starts here. If you don't pass a law, they can't write regs on it.

What we are telling you is let's—and sometime I think it might be good if we just took five or six departments and did away with them, took half the money, took one person to now be responsible for building free enterprise in America for the Government and let them have half the money and come back with programs that will work. Otherwise, you still have civil service employees that are making decisions. Unless you drag them to court——

Mr. SISISKY. All they will do is hire consultants. You know that. You have got—even in regulation, you got a whole industry just in consultants today. What are you going to do about those poor consultants?

Mr. FARIS. Congressman, there are additional things we can do that are—building the challenge, if we could extend that out to 2 years. There is no way we can expect small business owners in 90 to 120 days to pick up on this. We need to go 2 years out.

We need to put a moratorium on them to start with, and we need to give the court an opportunity to rewrite the reg if the agency refuses to do it, which happens from time to time. There is a lot more we can do. We think, in this one, one of the keys is that the 120 days is not enough. We really need a minimum of 1 year, and hopefully 2.

Chairwoman MEYERS. Thank you very much.

Thank you, Mr. Sisisky.

Mr. Luther.

Mr. LUTHER. No. No thank you, Madam Chair.

Chairwoman MEYERS. Mr. Thompson?

Mr. THOMPSON. None.

Chairwoman MEYERS. All right. I thank you all very much.

Just to review, I think we have learned a lot today. I certainly will talk with Mr. Hyde and we will work together. If there is real concern there that we have broadened the Regulatory Flexibility Act to include not only small businesses but large businesses, I think we all have agreed maybe that we should walk before we run and that the—I would like to make sure that we can accomplish this and that it is a success for small business.

Nobody is disputing the fact that regulations impact heavily on both large business and small business, but I would like to focus our attempts in the Regulatory Flexibility Act on small business. I do believe that right now it simply requires cost assessment of

rules no matter what size business they affect, but as I understand it, Mr. Glover has said that if you bring large businesses into the act, that there may be some question as to who has to have the regulatory flexibility analysis and whether the amicus briefs have to be filed for all sizes of business. We want this to be successful and I will talk with Mr. Hyde and we will have further hearings on this.

Section 610 of the Regulatory Flexibility Act as it now exists requires the periodic review of rules on the books, as I understand it, and this was supposed to have been completed within 10 years of the enactment of the Regulatory Flexibility Act, which was in 1980.

In other words, it should have been completed by 1990, a complete review of past rules. So far as I know, not one agency has complied with this, and so it is a law that I think has a good purpose and a good meaning and it has been ignored and we will see what we can do about that in the best, most efficient way.

I thank you all very much for being with us today. Adjourned.

[Whereupon, at 4:05 p.m., the committee was adjourned, subject to the call of the chair.]

APPENDIX

STATEMENT OF CONGRESSWOMAN EVA M. CLAYTON
BEFORE THE COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES
"STRENGTHENING THE REGULATORY FLEXIBILITY ACT"
Tuesday January 23, 1995

Madame Chairwoman, The legislative intent of the Regulatory Flexibility Act was to address the problems associated with the imposition of uniformed regulations onto small businesses and organizations. It does this through a two step process. First, the RFA requires agencies to make a determination as to the economic impact of any proposed rules on the targeted small businesses. If the federal agency finds that the proposed rules will not have a detrimental economic impact upon a significant number of the small businesses, then the agency is required to certify this fact in the Federal Register. If, however, the federal agency discovers, through its analysis, that a substantial number of small businesses will be harmed by the impending rules, then the agency must release a report that, among other things, describes why the agency is going to act and states, if possible, the number of small businesses to which the proposed rules will apply. Furthermore, the RFA requires agencies to offer alternatives to the proposed rules that would accomplish the same goals, while limiting the impact on the small businesses.

In the years since its enactment, the RFA has failed to accomplish its stated objectives, namely, relieving small businesses of the burden of misapplied federal rules and regulations. This can largely be attributed to weak enforcement statues in the law, the law does not provide for judicial review, and indifferent and inconsistent adherence to the law by federal agencies.

In the last Congress, H.R. 830 - the reauthorization of the Regulatory Flexibility Act, attempted to address these and other problems associated with the RFA. Although, receiving broad bi-partisan support, this Bill died in the Judiciary Committee. In today's hearing, we are attempting to lay the groundwork upon which the RFA can be strengthened and reauthorized. However, I am fearful of any attempt to broaden the definition of small businesses to include larger corporations. I believe, that we can and should draw a clear distinction between the regulatory needs of small companies, those with twenty or less employees and the regulatory needs of larger companies, those with two hundred or more employees. In so doing, we not only recognize the essential differences in economies of scale between small and larger corporations, but we also produce regulation that is both relevant and well thought out, not burdensome and ill-conceived. In addition, we must be willing to reexamine those existing federal regulations, exorcising those that are antiquated and strongly enforcing those that are effective and necessary.

STATEMENT OF THE HONORABLE JOHN J. LaFALCE
RANKING DEMOCRATIC MEMBER
COMMITTEE ON SMALL BUSINESS

THE REGULATORY FLEXIBILITY ACT: ARE FEDERAL AGENCIES ACHIEVING GOALS FOR REDUCING UNNECESSARY REGULATORY BURDENS ON SMALL BUSINESS?

January 23, 1995

Chairman Meyers, I thank you for scheduling today's hearing on a matter of vital and continuing concern to our nation's employers. Signed into law almost 15 years ago, the Regulatory Flexibility Act was a landmark effort to reduce the overwhelming burden of regulatory requirements on small business. In a nutshell, this critical piece of legislation requires that federal agencies perform a good faith analysis of the costs and other impacts new regulations may impose on small enterprise, and to minimize those impacts.

The core theory underlying the act is that the burden of federal requirements is disproportionately high on small employers. Without economies of scale, the cost of meeting federal demands may literally drive some of these enterprises out of business. With small businesses creating in the neighborhood of four out of five new jobs in our economy, unnecessary, business-killing regulations are something we cannot afford.

It is indeed timely that our committee revisits this act, and reviews the progress agencies have made in meeting its important goals. We will hear from several businesses who deal with federal regulatory demand virtually on a daily basis. We all realize that the act has been only partially successful because of some inherent weaknesses in the original legislation. Mrs. Meyers and I were leading sponsors of bi-partisan legislative efforts in the last Congress to correct those deficiencies. Presumably, our business witnesses, today, will underscore the great need for those changes.

I want to acknowledge the chairwoman's agreement to our request that Jere Glover, head of the Small Business Administration's Office of Advocacy, testify at today's hearing. I also thank her for scheduling further hearings next month to include witnesses from agencies charged with implementing this law. It is the minority's understanding that Regulatory Flexibility reauthorization legislation will not be reported to the floor before these oversight hearings are fully concluded.

New members of this committee should be aware that the general outline within the Contract for America (H.R. 9) for strengthening and reauthorizing the Regulatory Flexibility Act has had overwhelming bi-partisan support in previous Congresses. Indeed, the Contract's language on this matter, as specified in Title VI, mirrors H.R. 830, last year's reauthorization bill.

STATEMENT OF
REP. JAN MEYERS (R-KS)
CHAIR
COMMITTEE ON SMALL BUSINESS

JANUARY 23, 1995

"STRENGTHENING THE REGULATORY FLEXIBILITY ACT"

The Regulatory Flexibility Act, which became law in 1980, was the result of the efforts of many small businesses throughout this country. The issue of regulatory relief and regulatory flexibility was a dominant theme at the 1980 White House Conference on Small Business, and the participants at that conference pushed for legislative action.

The rationale behind the Regulatory Flexibility Act is really quite simple: (1) federal agencies often do not recognize the impact that their rules will have on small businesses; and (2) small businesses are more likely to be disproportionately disadvantaged by federal regulation compared to larger businesses.

The Regulatory Flexibility Act was enacted to secure federal agency recognition of these factors and require agencies to attempt to reduce the regulatory burden on small business by writing better rules. By mitigating the potentially adverse impact of government regulation on small businesses, the viability and success of small businesses will be determined in the marketplace and not by someone drafting regulations in a distant federal office building.

While the Regulatory Flexibility Act and its implementation have met with some success, I and many others believe the Act needs to be strengthened. A major weakness in the law as it presently exists is that there is no enforcement mechanism. Because the Regulatory Flexibility Act is not subject to judicial review, agency compliance has at times been poor. In fact, many agencies view compliance as voluntary.

At the beginning of the 103rd Congress, Rep. Tom Ewing (R-IL) introduced H.R. 830, a bill to amend the Regulatory Flexibility Act. This legislation was designed to, among other things, provide for full judicial review of agency compliance. H.R. 830 received widespread bipartisan support, which peaked at over 250 cosponsors. Almost every Member of this Committee was a cosponsor. In addition, dozens of business trade associations supported H.R. 830.

Near the end of the First Session of the 103rd Congress a hearing was held before the House Judiciary Subcommittee on Administrative Law concerning H.R. 830. Unfortunately, the Judiciary Subcommittee never moved H.R. 830 despite multiple appeals to do so by both Republicans and Democrats.

On March 17th of last year, during consideration of S. 4 (the Senate version of the National Competitiveness Act), Senator Wallop (R-WY) introduced an amendment which, among other things, provided for full judicial review of the Regulatory Flexibility Act. After a motion to table the Wallop amendment was defeated by a vote of 67 to 31, the amendment passed by voice vote. Shortly after Regulatory Flexibility Act reform was included in S. 4, efforts began in the House to agree to judicial review for the Regulatory Flexibility Act.

On July 19th of last year, the House conferees on the Competitiveness Act were named. At that same time, a motion to instruct the House conferees (to accept the Senate's approach to judicial review) was offered by Rep. Walker (R-PA). That motion to instruct passed by a vote of 380 to 36. Unfortunately, the Competitiveness Act died in conference.

The "Contract with America" contains a legislative proposal to strengthen the Regulatory Flexibility Act which is identical to H.R. 830 from the last Congress. Title VI of H.R. 9, the Job Creation and Wage Enhancement Act, addresses the important small business issue of providing judicial review of federal agency compliance with the Regulatory Flexibility Act. I hope that the Members of this Committee, and of the House in general, can demonstrate the same bipartisan support for the "Contract" provision that was demonstrated for H.R. 830.

NAM National Association of Manufacturers

MANUFACTURING MAKES AMERICA STRONG

TESTIMONY OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS

ON REFORM OF THE REGULATORY FLEXIBILITY ACT

BY
JAMES P. CARTY
VICE PRESIDENT, SMALL MANUFACTURERS

BEFORE THE
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

JANUARY 23, 1995

1331 Pennsylvania Avenue, NW, Suite 1500 - North Tower, Washington, DC 20004-1790
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Manufacturing: The Key to Economic Growth

- ✓ U.S. manufacturing's direct share of the Gross Domestic Product (GDP) has averaged more than 21 percent since World War II. And nearly half of economic activity depends indirectly on manufacturing.

- ✓ U.S. manufacturing productivity growth averaged 3 percent during the 1980s compared with almost zero growth in the rest of the U.S. economy.

- ✓ U.S. manufacturing exports have been the *single main source of strength* in the current economy — contributing 30 percent to 40 percent of the nation's economic growth since 1987.

- ✓ Each $1 billion of exports creates 20,000 new jobs. Since 1985, exports have saved 4 million jobs in U.S. communities.

- ✓ Manufacturing jobs on average pay 15 percent more than jobs elsewhere in the economy.

- ✓ Manufacturing provides the bulk of technological advances and innovation for the economy.

Regulatory Flexibility Act Reform
Executive Summary

The National Association of Manufacturers (NAM) supports a proposal to provide judicial review of implementation of the Regulatory Flexibility Act (RFA). The RFA was passed with the purpose of requiring agencies to tailor their proposed rules to lessen the regulatory impact on small business. Since its enactment by Congress, it is a widely held belief that the RFA has not been fully implemented by agencies throughout the federal government.

TESTIMONY OF THE NATIONAL ASSOCIATION OF MANUFACTURERS
ON REFORM OF THE REGULATORY FLEXIBILITY ACT
BY
JAMES P. CARTY
VICE PRESIDENT, SMALL MANUFACTURERS
BEFORE THE COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES
JANUARY 23, 1995

The National Association of Manufacturers (NAM) welcomes the opportunity to testify in support of a proposal to provide judicial review for implementation of the Regulatory Flexibility Act of 1980. The need for such reform is an idea whose time has come. A bipartisan majority of Congressmen and Senators supported such legislation during the 103rd Congress. President Clinton's National Performance Review supported the change.

The burdensomeness of federal regulations is dramatized by a University of Rochester study (1993) that concluded that the cost to the private sector to comply with regulations was at least $430 billion annually. Stated another way, the cost of compliance is the equivalent of 9 percent of our gross domestic product. There are a number of indications that predict that the flow of regulations will continue to grow.

The *Federal Register*, the "bible" for federal regulatory activity, was in excess of 68,000 pages for 1994. We expect the *Register* will continue to grow in size with the regulations that will be generated from Clean Air Act amendments, the implementation of the Americans with Disabilities Act, and others. A week after the election, the *Federal Register* published, with very little fanfare, the regulatory plans of 64 federal agencies that laid out their agendas for 1995. Basically, these agendas set out actions that delete some rules but

add or amend even more. The complexity and scope of the subjects covered can be demonstrated by the fact that 1,690 pages of the *Register* were taken to set out the plans of the myriad of agencies doing business in the nation's capital.

The final factor to be considered is that, according to the civics books, the government is composed of three branches. But if you work in Washington, you know that there is a fourth branch and that encompasses the bureaucracy that directs and operates the various agencies. The recent election will have very little effect upon the leadership of these agencies and, in fact, we can expect an influx of former "Hill" staffers moving to the agencies -- aided by the Ramspeck Act, a little-known law passed in 1940 that gives preference to former congressional staff members for employment in executive branch agencies, without having to go through normal civil service procedures. Thus, you now have the staff that helped write the laws in a position to enforce them. Taken together, these factors could indicate a continuation and even an acceleration of the regulatory flow from Washington.

For a number of years we have been hearing from our members, both large and small, about the ever-increasing flow of regulatory and paperwork requirements being placed on them by the federal government. The rules have grown more complex, and very often a violation of a rule or regulation can result in a high fine or even a criminal indictment for activity that had never been considered criminal activity before this time.

But the agencies are not solely responsible for the increase. Congress has played an important role in the growth of burdensome regulation by the ever-increasing creation of new and expanded laws requiring more and more federal control and direction. Besides looking

at the activity of agencies, we think it is time for Congress to stop and ponder the effects its proposals have on the economy and our people.

The Regulatory Flexibility Act of 1980 (RFA) was enacted to provide assistance to the small business community by requiring the agencies to determine if a proposed rule would unduly impact upon small businesses and to then determine ways that the regulations could be implemented to reduce or eliminate the impact upon small business.

The RFA has been a failure for a number of reasons, one of which is the inability of the affected small businesses to sue for relief from an agency that either fails to comply with the RFA or pays lip service to the Act by claiming that the Act does not apply to a particular proposal because it does not have an impact on small business. There are many instances of this occurring; for example:

- In June 1994 the Environmental Protection Agency (EPA) proposed emission standards for hazardous air pollutants for aerospace manufacturing and rework, i.e., maintenance, cleaning, repainting, etc. According to EPA's own estimates, more than 2,800 facilities would be covered by the proposed rule for this industry. Many of these facilities we believe are small businesses. The EPA, in the proposal, made the categorical statement that RFA did not apply to the proposal; therefore EPA did not do a regulatory flexibility analysis. This failure of EPA to carry out the minimal requirements of the RFA were called to the attention of the Office of Information and Regulatory Affairs (OIRA) and that office declined to take action.

- In May 1994 the Pension Benefit Guaranty Corporation (PBGC) proposed a rule regarding debt collection by administrative offset of payments to be made to contractors

by third party agencies for government work performed under a contract. The PBGC made the claim that the RFA did not apply because the rule would not have a significant economic effect on a substantial number of small entities. This assertion was challenged and OIRA agreed that the proposal could have an effect on small business and directed the PBGC to take cognizance of the possible impact in its future rulemaking and to consider the necessary action to alleviate the impact on small businesses.

To make the RFA an effective tool to reduce unreasonable, burdensome regulation, the NAM recommends that small businesses be allowed to bring legal action against a federal agency that fails to comply with the minimal requirements of the RFA.

The NAM also recommends that an agency like the Small Business Administration be given the job to enforce compliance with the RFA. This addition would strengthen the RFA by giving a specific agency responsibility for its enforcement. With this suggested change, we see fewer legal actions by individual companies challenging agency actions.

This completes my prepared statement. I welcome questions from the Committee.

NFIB
National Federation of
Independent Business

STATEMENT OF

JACK FARIS

PRESIDENT
and
CHIEF EXECUTIVE OFFICER

NATIONAL FEDERATION OF INDEPENDENT BUSINESS (NFIB)

Subject: The Regulatory Flexibility Act and Regulatory Reform

Before: House Committee on Small Business

Date: January 23, 1995

600 Maryland Ave. S.W., Suite 700 • Washington, DC 20024 • 202 554 9000 • Fax 202 554-0496

Madam Chairman, my name is Jack Faris and I am the President and Chief Executive Officer of the National Federation of Independent Business (NFIB). NFIB is the nation's largest small business advocacy organization, representing more than 600,000 small business owners in all 50 states and the District of Columbia. The typical NFIB member employs five people and grosses $250,000 in annual sales. NFIB's membership mirrors the nation's industry breakdown with a majority of its members in the service and retail sectors.

I want to thank you Madam Chairman and the Committee for having me here today to discuss one of the most frustrating and aggravating problems facing small business owners today -- government regulation, paperwork, and red tape. But before I go into the horrors of regulation, it is important for the Committee to understand the composition of the business community and some demographics of small business owners.

First, it is important to look at the business community as a whole. One inaccurate perception in this country is that all business is big business. This is not correct. There are five million employers in the United States today. Of those five million, 60 percent of them employ 4 employees or fewer and 94 percent employ fewer than 50 employees. These figures illustrate a fact that is typically lost during debates on the impact of certain legislation and regulations -- small business by pure volume dominates this country's economic engine.

Another misleading perception is that a small business is a smaller version of a big business. Nothing could be further from the truth. For example, one-half of small business owners start their business with less than $20,000, most of which is from personal or family savings. Most small business owners do not make a lot of money (40 percent earn less than $40,000); they survive on cash flow not profitability. Start-up small businesses are the most vulnerable. Of the 800,000 to 900,000 businesses that start each year, half will be out of business within five years. Many small business owners will tell you that the burden of regulation has much to do with whether they survive or perish. While it is rough going at the start, the small businesses that do make it are the major job generators in this country. From 1988 to 1990 small business with fewer than 20 employees accounted for 4.1 million net new jobs, while large firms with more than 500 employees lost 501,000 net jobs.

Many in Washington have noted the absence of a consensus on a great number of issues facing this country. But there is growing bipartisan agreement about a phenomena that is taking place in America's small business sector -- the burden created by federal regulation falls predominantly and disproportionately on the very people who we rely upon to create jobs, small business owners. To that end, I would like to focus on four topics today. First, I will describe to the Committee the frustration small business owners face dealing with regulations. Second, I will explain why NFIB believes the Regulatory Flexibility Act is important and why it needs to be strengthened. Third, I will discuss broader efforts to accomplish regulatory reform that NFIB has supported for years, many of which are part of the Contract with America. And finally, I will share with you NFIB's reasons why outdated laws and regulations need to be reviewed and changed.

The Costs and Horrors of Regulations

Small business owners across this country are being trampled by the costs and burdens associated with regulations. The evidence is abundant and also easily convincing. NFIB has gathered it from our own research, others in Washington researching this issue, and most importantly from individual members who are struggling to comply with the federal government's web of regulations.

The NFIB Education Foundation, NFIB's research arm, published in 1992 an extensive survey entitled "Small Business Problems and Priorities". It looked at and ranked the top 75 problems facing small business. And to the surprise of many, problems relating to regulation and government paperwork were the fastest rising area of concern in the entire survey. In the most recent data available from the NFIB Education Foundation's monthly "Small Business Economic Trends," taxes and regulations were the top problems facing small businesses in America.

Another NFIB Education Foundation study ("New Business in America") clearly illustrates the impact regulations have on new businesses, which create about one-third of the new jobs in the economy. The study found that of all the challenges faced by a new business, owners are least prepared to deal with government regulations and red tape, and are generally surprised by the extent to which government plays a role in their business.

When looking at the data it is easy to see why regulations are the fastest growing concern to small business owners. The dead-weight loss to society from regulation is estimated to be more than $1 trillion dollars per year. By dead-weight, I mean that the losses due to regulation exceed the benefits of the regulation by more than $1 trillion per year.

According to studies done by Thomas Hopkins of the Rochester Institute of Technology and William G. Laffer III and Nancy Bord of the Heritage Foundation, the direct costs of regulatory compliance to businesses that are associated with regulatory compliance are somewhere in the range of $500 billion to $800 billion dollars. The current Administration pointed out in its National Performance Review that the compliance cost imposed by federal regulations on the private sector were at least $430 billion per year or 9 percent of GDP.

Complying with regulations costs our economy dearly. The hidden tax of complying with regulation is no less a tax than any other government levy. And when it comes to businesses, this hidden tax is regressive; it hits the "little guy" the hardest.

There are several reasons why smaller businesses bear a heavier regulatory burden than larger businesses. One reason has to do with the fixed cost aspect of regulation. Almost all regulations have some fixed costs. Fixed costs are independent of output, i.e., any company affected by the regulation pays the same fixed cost. An example of fixed costs would be a requirement that every firm complete a lengthy quarterly report submission to a regulatory agency. It would cost every firm the same amount to complete the report.

But larger firms can spread the fixed costs over large quantities of output. The average fixed cost or fixed cost per unit of output is low, therefore, it has only a small effect on price. The smaller company with the same fixed cost, but lower levels of output, has a much higher fixed cost per unit of output. If the smaller firm passes the cost on to the consumer by raising prices, fewer will buy the product at the higher price and profits will fall.

This is a technical explanation, but simply put, small business because of economies of scale is not equipped to deal with federal regulations. Walk into any small business and look for the accounting department, the legal counsel, or the human resources division. You will not find them.

Unfortunately, the case I just made has never been understood by bureaucrats. The avalanche of regulation continues to pummel the small business owner. Case in point, there were 64,914 pages in the Federal Register in 1994, this is compared to 44,812 pages in 1986 -- an increase of 20,102 pages. Just remember how small the print is on each page of the Federal Register and one can begin to conceptualize the burden of the regulatory avalanche.

The letters we receive from NFIB members speak louder than statistics. For example, a small construction company inquired about bidding on a small remodeling project at a post office in South Dakota. The owner says he received 34 pages of plans, 400 pages of building specs and a 100 page book of bidding instructions. Of these instructions, this small business owner wrote in a letter to the U.S. Postmaster, "If [your] goal is to discourage prospective bidders, I'm sure [you have been] successful."

Then there is the woman from Connecticut who used her and her husband's family savings to open a small manufacturing business. She says, "While these regulations start out with good intentions, the end result is that many become confusing and are too onerous for a small business owner like myself to deal with effectively. As a result, the employees also suffer. The money we spend simply trying to comply with these rules could be better spent on the growth of our business, creating more jobs and benefitting our current employees."

As an example she points to certain OSHA rules. "There's the lockout/tagout requirement that needs a manual basically to say if a machine is not functioning properly, turn it off, pull the plug and make sure nobody else uses it until it's fixed. Of course, in a small shop like ours, with few machines, everyone knows when a machine is broken, and the machine is fixed immediately or we can't produce. There is the Material Safety Data Sheets, which is a listing for various types of hazardous materials which must be kept track of. Yet, after some searching, I am still unable to find someone knowledgeable on these substances and where they are found exactly."

Then there is the small business owner who is confused by the I-9 immigration forms. She writes, "It reads something like a Chinese food menu."

Yet another example is the woman small business owner from Florida who comments on small business's inability to secure financing because of government regulation, "...red tape or paperwork is the single biggest obstacle in securing small business financing today. Business owners are often totally discouraged and disgusted with the amount of paperwork required for lines of credit, small business loans, home equity loans, etc. And the costs involved in closing a loan due to regulations that must be enforced are staggering. Commercial appraisals have risen from approximately $1,000 to $2,500. Documentary preparation fees have risen from $0 to $250. A recent small business loan of $300,000 secured by real estate had closing costs of a whopping $8,600 or 2.9% of the loan value -- all attributable to new regulatory guidelines."

Finally, a small business owner from Maryland illustrates what is wrong with the system, he states; "Under current operating rules, OSHA representatives cannot consult or advise us -- if they come on our job sites they can only write citations. You must certainly understand that this engenders an 'us vs. them' mentality if we are visited." He goes on to explain, "Currently, even the smallest error in safety can result in an expensive fine or many hours of letter writing, meetings, lawyers and management hours expended. This is so because in the present context OSHA has admitted that the penalty structure is designed not to improve safety but rather to raise revenue."

Need for Strengthening the Regulatory Flexibility Act

There are many things that can be done to ease the burden of regulations that are placed on the backs of small businesses. A great place to start would be to strengthen the Regulatory Flexibility Act.

As this Committee knows, the Regulatory Flexibility Act of 1980 is not protecting small business from regulatory burdens as it was originally intended. The Regulatory Flexibility Act was designed to ease the regressive impact of "one-size-fits-all" regulations on small business. It was supposed to force regulators to consider the differences between big and small businesses.

Under the Regulatory Flexibility Act (Reg-Flex), agencies issuing regulations must analyze and describe the impact the regulation would have on small businesses and other small entities. The analysis is supposed to outline possible alternatives to the proposed rule which would accomplish the same objectives at a lower economic impact on small business.

At the same time the final rule is issued, the changes (or lack of changes) made to the regulation on behalf of small business are also published. If a less costly alternative for small business was not adopted, an explanation must be published by the agency.

Sounds good, doesn't it? Here's the problem -- there is no way to enforce compliance of regulators with Reg-Flex. Section 611 of the original Act includes a specific prohibition on judicial review of Reg-Flex analyses. Because Reg-Flex is not enforceable, agencies like the Internal Revenue Service and the Department of Defense, exploit the loopholes and ignore the Reg-Flex Act. Small business needs a hammer to force agencies to comply. That hammer is judicial review, or judicial enforcement, which will allow an agency's compliance with Reg-Flex to be challenged in a court of law.

In the 103rd Congress under Congressman Tom Ewing's and Senator Malcolm Wallop's leadership, both Houses of Congress overwhelmingly approved judicial review to the Regulatory Flexibility Act. Unfortunately, the National Competitiveness Act, which was the vehicle for this needed reform, never made it to the President's desk because of disputes with other provisions in the legislation.

In this new Congress, we are hopeful the President will live up to the tone he set in his letter to the Senate last year. He stated "my Administration will continue to work with Congress and the small business community next year [1995] for enactment of a strong judicial review that will permit small businesses to challenge agencies and receive meaningful redress when agencies ignore the protections afforded by this statute." His support for strong judicial review was echoed in additional letters by the Administrator of the Small Business Administration, Phil Lader, and by the President's Chief of Staff, Leon Panetta.

NFIB has developed a series of recommendations we believe will strengthen the Regulatory Flexibility Act.

1. Repeal the prohibition on judicial review.

2. As long as a small business can prove that it is adversely impacted by a regulation, we believe the firm should have standing and be allowed to challenge a Reg-Flex analysis that wasn't done at all or was flawed in its analysis.

3. NFIB believes a business should have at least one year -- preferably two -- from the time the final rule was published to challenge the Reg-Flex analysis. We oppose requiring businesses to have commented on the regulation during the initial comment period before they have standing, which is the ability to challenge the analysis in court.

4. Courts should have the ability to "stay" -- or put on hold -- federal regulations before them if they would have an adverse economic impact on small businesses.

5. If an agency continues to ignore small business and their responsibilities under Reg-Flex, after being ordered by the court to reconsider their Reg-Flex analysis, the court should have the ability to revise the regulations itself taking small business into consideration.

6. Finally, we believe that agencies should consider not only the direct effects of regulations, but the indirect effects as well.

NFIB is committed to ensuring small business owners receive strong and effective judicial review under the Regulatory Flexibility Act and look forward to the President signing a bill into law that will accomplish this.

The Need For Broad Regulatory Process Reform

There are other reforms that would help significantly reduce the impact of the federal regulatory burden.

Many of the regulatory reforms that NFIB has been fighting for are included in the Contract with America. NFIB supports the reforms outlined in the Contract with America.

One of these reforms would be to strengthen the Paperwork Reduction Act (PRA). Let me start by making one thing clear -- **paperwork is regulation and regulation is paperwork.** The PRA, signed into law in 1980 like the Regulatory Flexibility Act, addresses the problem of growing paperwork burdens. The law created within OMB the Office of Information and Regulatory Affairs (OIRA) to review and approve -- or, if too burdensome or unnecessary, disapprove -- all paperwork requests agencies want to impose on the American people. However, because of a dispute between Members of Congress over the scope of its role, this paperwork reduction office has not been reauthorized since 1989.

The law was further weakened by a Supreme Court decision, Dole v. United Steelworkers, which exempted from OIRA's review any government forms that do not have to be returned to the federal government (such as I-9 forms). The third party paperwork requirements account for about one-third of all government paperwork. There has also been a problem with agency noncompliance with the Act.

Lengthy negotiations in both Houses of Congress finally produced a compromise reauthorization bill last year. It would have reasserted a central role for OIRA to act as the government's clearinghouse for paperwork and overturned Dole v. United Steelworkers. It also affirmed a five percent per year government paperwork reduction goal.

This year NFIB hopes Congress will go even further to control and reduce the avoidance of government paperwork burying small business owners. First, government paperwork demands on small business need to be reduced by 10 percent per year. After five years of 10 percent reductions, we need to impose a paperwork budget. The only way government would be allowed to create new paperwork requirements would be to eliminate existing requirements -- quite simply, a zero sum game.

Another proposal to control overzealous regulations would be to enact a regulatory moratorium. It would stop the bleeding and allow the federal government to take a step back and look at what is really necessary and what is not.

NFIB supports the efforts of Congressman Tom DeLay and Congressman David McIntosh to pass H.R. 450, The Regulatory Transition Act of 1995. They are to be commended for their efforts to craft legislation that will allow the government to stop the steady flow of new rules that frustrate small business owners, while at the same time allow the promulgation of needed regulations to continue.

Under H.R. 450, a regulatory moratorium would be imposed, beginning November 9, 1994 and ending June 30, 1995, on new rule making actions by the federal government. The President would be required to publish a list of all regulatory rule making actions covered by the moratorium 30 days after the date of enactment. Many onerous regulations that could harm small business would be put on hold and have to be reevaluated.

The opponents of H.R. 450 paint this as a draconian tactic to stop the government from meeting its responsibilities under the law. They portray its effect as harmful to public health and safety. That's not H.R. 450's intent. It's meant to stop the bleeding and force the regulators to step back and reevaluate the impact of their actions on small business owners and over other regulated, frustrated citizens.

Much thought and effort went into drafting H.R. 450. It exempts certain needed regulations from the overall moratorium, including any rule that would streamline or reduce regulatory or administrative action, as well as license and registration approvals.

More importantly, H.R. 450, allows for "Emergency Exceptions; Exclusions". In other words, "exceptions" could be granted in response to written requests from agency heads via Executive Order by the President because of an "imminent threat to health or safety or other emergency" or "for the enforcement of criminal laws." Surely, this allows government to continue to operate to protect the public welfare.

These "Emergency Exceptions; Exclusions" are important to small businesses as well. Indeed some regulation is required. Small business owners care about the environment in which they live and do business. The land that surrounds them is part of their community and their employees are like family, so their health and safety is a top priority. And it is more than just their personal relationship with their employees that motivates their actions. As one small business owner from Maryland said, "Put bluntly, the market place demands a safe workplace. You cannot afford to do otherwise." H.R. 450, the regulatory moratorium, is a proper step toward reducing the growing impact of regulation on small business owners.

Beyond these two very important regulatory reforms there are many others that should be considered. For example, Congress should strengthen private property rights protections and restrict takings. With federal land regulation continuing to increase, small business property owners are increasingly denied the use of their land by government enforcement of environmental laws. The language of the U.S. Constitution's Fifth Amendment must be reaffirmed: The federal government may not "take" private land without paying the owner fair market value. In a recent NFIB "Mandate Ballot," 81 percent of NFIB members said landowners should be compensated when federal actions reduce the value of property.

Another effective tool in the war against excessive regulation is requiring federal regulators to use risk assessment/cost benefit analysis or a regulatory impact analysis when writing their rules. The federal government often implements new laws and regulations without any thought or recognition of the costs imposed on businesses and jobs. Congress must ensure that no new requirements are put on the books unless the benefits clearly outweigh the costs of the action and there should be a clear understanding of what the nation is getting in return. NFIB believes that any new laws or regulations must provide benefits that outweigh costs and that the methods used to calculate the impact are reasonable and responsible. Moreover, survey data tells us NFIB members overwhelmingly support the concept of a regulatory impact analysis that is included in the Contract with America.

One way to get a grip on the skyrocketing costs of regulations is to establish a regulatory budget. A regulatory budget should be established that would require federal agencies to disclose the costs their regulations will impose on both businesses and individuals. NFIB supports this proposal in the Contract with America that ensures that the growth and cost of regulation is curtailed.

Finally, agencies should be required to sunset regulations every five years. The federal government has on its books a large number of regulations that have long since outlived their effectiveness. Regulations should not have a life of their own. A requirement to sunset and reauthorize all government regulations would force Congress and agencies to review each program's merits and effectiveness before it can be reestablished.

Need for Review of Current Laws

Many of the regulations and paperwork requirements that have frustrated small business owners come from laws which are dated and need to be reviewed, or by laws that simply restrict small business owners for no good purpose. One simple way for Congress to ease the regulatory burden is for it to review and even rewrite laws such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), the Americans With Disabilities Act (ADA) and Superfund, to name a few.

For example, the FLSA is one of the worst in terms of the paperwork regulation it imposes on small employers. NFIB continuously hears complaints from our members regarding wage and hour reporting requirements. The administrative and paperwork burdens caused by this law should be reduced so that small employers can comply more effectively and avoid costly mistakes that could shut down their businesses.

Another example of how the FLSA is outdated is the overtime requirements it imposes. Unlike public sector employers, private sector employers may only provide extra financial compensation to employees for overtime work. To many employees, additional time off is at least as valuable as extra money. Yet, the law prohibits employers from offering time-and-a-half compensatory time instead of time-and-a-half monetary premiums. NFIB believes that Congress needs to fix this dated regulation that restricts both employer and employee.

All of the laws mentioned have examples of regulations that are not small business friendly or sensitive. They, and a host of other old statues, need to be reviewed and rewritten where needed.

Conclusion

Madam Chairman, NFIB small business owners spoke loudly on November 8. Their message to Washington was plain and simple -- **get government off our backs, out of our pockets, and off our land** so we can do what we do best: build businesses, create jobs, provide for our families and make meaningful and constructive contributions.

Strengthening the Regulatory Flexibility Act is a great place to start to help them. But please do not stop there. I strongly urge this Committee to act quickly on the regulatory reforms in the Contract with America and those that I have outlined that move beyond it.

The regulatory situation for small business is approaching crisis proportion. More and more small businesses are being literally overwhelmed by regulations. I have given you the horrifying statistics on the out of control regulatory freight train. Please do not let this train wreck another small business and keep it from being the engine of our economy.

Thank you Madam Chairman for allowing me to testify today on behalf of NFIB's over 600,000 small business owners. I thank you for the work you have done in this area already and I thank you in advance for your leadership on these issues in the 104th Congress.

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

Testimony of

Jere W. Glover

Chief Counsel for Advocacy

United States Small Business Administration

Before the

Committee on Small Business

of the

House of Representatives

January 23, 1995

Good afternoon, Madame Chairwoman and members of the Committee: It is a pleasure to appear before the Committee on Small Business.[1] The issue before the Committee this afternoon -- the regulatory burdens faced by small business is a subject of paramount interest to me. As you know, every major small business trade association and the 1986 White House Conference on Small Business have noted the regulatory burdens faced by small business.

As you know, the 1995 White House Conference on Small Business process is well underway. To date 36 state conferences have been held and the final 23 will be completed by April 13th. Regulatory reform has been a major area of concern at all of these conferences and an amended Regulatory Flexibility Act, specifically, was raised as a means to achieve meaningful reform for small business. Some states which recommended amending the RFA to allow for judicial review include Illinois, Indiana, Minnesota, Virginia and Massachusetts. Every state has recommended that the rulemaking process be changed to allow for more small business input and to allow more flexibility in the drafting and enforcement of regulations.

After listening to an hour and a half of discussion of the paperwork and regulatory problems facing small business one of the participants in one of the state White House Conferences on

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[1] My testimony this afternoon reflects the independent views of the Chief Counsel for Advocacy and may not reflect the views of the Administration.

Small Business summed up the problem by saying "It seems like saving spotted owls is more important to Washington than saving small business."

The question facing both Congress and the executive branch is how do we minimize these regulatory burdens, provide the underpinnings of vibrant economic growth, and still protect the public from imminent threats to health and safety.

As a preliminary matter, I believe it is critical that the executive branch and the legislative branch work together to solve this problem. Regulations are often imposed as a result of legislation. For example, the Clean Air Act Amendments of 1990[2] and the Cable Consumer Protection and Competition Act of 1992 (Cable Act)[3] both require federal agencies to develop a sheaf of regulations. If Congress passes the least burdensome laws to meets its goals and agencies are committed to adopt simplified regulations, small business will feel real regulatory relief. When legislation is pending, agencies should be pushed hard during legislative debate to give the real cost of the legislation and implementing regulations on small business.

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[2] The Clean Air Act Amendments were passed by a bipartisan vote of both chambers and signed into law by President Bush.

[3] The Cable Act was enacted into law over the veto of President Bush by a wide bipartisan margin.

To say that the problem rests solely on the shoulders of Congress would be untrue. No doubt exists that federal regulators also need to do a better job of developing sensible regulation and tailoring those rules to both the size of the problem and the size of the enterprise. Regulators must understand that a one-dimensional approach to a multi-dimensional world is inappropriate. Congress recognized early on that regulations do not have the same impact on small and large businesses. The best vehicle for recognizing these distinctions is the Regulatory Flexibility Act (RFA) and better compliance with the Act by all federal agencies will provide substantive assistance in relieving regulatory burdens on small business.

Rational government decisions must be based on sound data filtered through a close analysis of potential alternative actions. The President, in his Executive Order 12,866 (as did predecessors Presidents Reagan and Bush), understands the need for increased analysis before regulating. The National Performance Review (NPR), President Clinton's effort to streamline government, recommended that compliance with the RFA be strengthened by permitting judicial review of agency determinations under the Act. The President, in a letter to former Senator Wallop, expressed his support for adding a judicial review provision to the RFA.

Having the Administrator of SBA on the National Economic Council with cabinet level status has allowed the voice of small business to be heard. Erskine Bowles' and Phil Lader's strong voices supporting judicial review for the Regulatory Flexibility Act, were essential in winning the President's strong support for this initiative.

I. The Rational Decisionmaking Process and the RFA

As you are aware, the Administrative Procedure Act (APA) prohibits an agency from taking actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law...." 5 U.S.C. § 706(2)(A). The courts have interpreted this mandate as requiring an agency to adopt rational rules.

Rational rulemaking presumes that an agency has identified a problem that needs correction.[4] It then accumulates information to determine the severity of the problem and potential corrective actions. After due consideration of various alternatives, the agency publishes a notice in the FEDERAL REGISTER requesting comments from interested parties. The agency considers the

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[4] For purposes of this discussion, I assume that the agency has the statutory authority to correct the problem but has no specific mandate to address the particular problem. In the case of a specific mandate from Congress (or in rare circumstances the courts), the process outlined will be the same except the legislation will have identified the problem to be corrected.

comments and issues a final rule responding to the comments and explaining why it took the action that it did.

Congress, in enacting the RFA, mandated that agencies add one further consideration to this process -- the impact of proposed solutions on small entities, including, but not limited to, small business.[5] The RFA is based on two premises: 1) that federal agencies often do not recognize the impact that their rules will have on small businesses; and 2) that small entities are disproportionately disadvantaged by federal regulations compared to their larger counterparts. Thus, rational rulemaking pursuant to the APA must be executed through the filter of the RFA. It is the job of the Office of Advocacy to monitor, improve and report to Congress on agency compliance.

II. Update on Advocacy Activities

The Office of Advocacy just released its Annual Report on the Implementation of the Regulatory Flexibility Act. That report provides an excellent summary of problems related to compliance with the RFA. Despite the difficulties outlined in the report, the Office of Advocacy has been aggressive in attempting to obtain improved agency compliance with the RFA.

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[5] As the Committee is aware, regulations often impose burdens on small governmental jurisdictions.

A. The Letters of Exchange

First and foremost, the Office of Advocacy exchanged letters with the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) (copies of which are attached). These letters commit the Office of Advocacy to provide guidance to agencies in complying with the RFA and raise concerns to the agency and OIRA. They also commit OIRA to provide us with draft proposed rules upon our request before they are published in the FEDERAL REGISTER and referee any disputes between the Office of Advocacy and the agencies. Sally Katzen, Director of OIRA, should be commended for her eagerness in cooperating to enforce the RFA.

The letters of exchange arose from OIRA and Advocacy's response to a recommendation from the General Accounting Office to have the two offices work more closely. More importantly, these letters recognize that the Office of Advocacy can be a valuable ally in OMB's efforts to further rationalize agency rulemaking procedures.

Nevertheless, the letters of exchange are not a comprehensive solution to the problem. OIRA's regulatory oversight does not extend to independent regulatory agencies, such as the Federal

Communications Commission or the Federal Trade Commission.[6] Nor does OIRA have authority to oversee the regulatory actions of the Agricultural Marketing Service with respect to the implementation of marketing orders.[7] Finally, OIRA's actions under the letters of exchange are voluntary and subsequent heads of OIRA and Advocacy need not abide by the letters of exchange.

More importantly, while Advocacy and OIRA hold sway over regulators, the APA places the final responsibility for deciding regulatory issues in the hands of federal judges. Judicial review of the RFA merely extends this principle to rules requiring small business analysis.

B. Use of Advocacy's Amicus Authority

Section 612 of the RFA authorizes the Chief Counsel to file amicus briefs in court when another party challenges an agency regulation. It appears that, in appropriate circumstances, even

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[6] The Paperwork Reduction Act empowers OIRA to review requests for information collections from all agencies including independent regulatory agencies. However, the independent regulatory agencies can override an OIRA disapproval of an information collection -- something executive branch agencies cannot.

[7] Appropriations riders enacted for the past ten years have prevented OIRA from expending any monies on oversight of implementation of marketing orders. The Office of Advocacy believes that this rider should be eliminated and OIRA have the authority to exercise its proper oversight of the program.

the threat of filing an amicus brief radically alters an agency's consideration of small business problems.

The Office of Advocacy has been involved intimately in the Federal Communications Commission's (FCC) implementation of the Cable Act. At an early stage, the Office of Advocacy recognized the severe impact that the rules would have on small cable operators, most of whom were not the genesis of problems that led to reregulation of the industry. Extensive comments filed by the Office of Advocacy concerning the burdens on small operators were dismissed by the FCC.

In 1994, the Commission finalized its rules on rate regulation. An association of small cable operators intervened in the litigation contesting the validity of the regulations, and in particular, compliance with the RFA and the Small Business Act. I saw this as an opportunity to test the roiling waters of § 612 and filed a notice of intent to file an amicus with the United States Court of Appeals for the District of Columbia Circuit. After the Commission learned of our intention to file an amicus brief, the Commission led by its General Counsel and head of the Cable Services Bureau, began earnest negotiations with the Office of Advocacy to arrive at a solution to the concerns we raised. After much negotiation, the Office of Advocacy and the Commission developed a satisfactory resolution to our concerns and we agreed not to file the brief.

Our interaction with the National Marine Fisheries Service (NMFS) demonstrates that threats to file an amicus brief, even of a non-imminent variety, can force an agency to improve its compliance with the RFA.

As you may be aware, the North Atlantic fishery, particularly in the Georges Bank, is heavily overfished. NMFS regulates fishing in accordance with the Magnuson Fishery Conservation and Management Act. NMFS recognized that overutilization of the North Atlantic fishery was endangering the long-term viability of the fishery and proposed stringent measures to reduce overfishing.

The Office of Advocacy, after discussion with a variety of affected entities, wrote NMFS requesting that it examine alternatives which may be less burdensome. A follow-up letter was drafted in which the Office of Advocacy criticized the Service for failure to respond to our previous filings and threatened to intervene in litigation[8] contesting the implementation of the Service's plan to deal with overfishing.

The response, as one might expect, was predictable. The number two lawyer at NMFS requested a meeting with the Office of Advocacy. Staff in the General Counsel's office of the

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[8] The litigation was withdrawn because it became moot due to subsequent and further rapid deterioration of the North Atlantic fishery.

Department of Commerce also contacted us. The Office of Advocacy had detailed discussions which led to modifications in the manner in which NMFS complies with the RFA. In addition, the Office of Advocacy now has an open channel with Commerce Department and NMFS staff to discuss RFA compliance.

The threat of intervention in litigation, while having both shock value and excellent results, is not a general anodyne to agency compliance with the RFA. The Office of Advocacy does not have the resources to intervene in every circumstance in which an agency did not comply with the RFA. Nor would that be an effective strategy with overuse. At some point, agencies would simply tell the Office of Advocacy to go ahead and file and that the agencies do not care.

III. Recalcitrant Agencies

A number of federal agencies have historically been less than cooperative in our efforts to obtain compliance with the RFA. This is not an exhaustive discussion. In fact, many agencies, with respect to particular rules, do not, in our estimation, fully comply with the RFA. Yet, the same agencies in other rulemaking activities do fully comply. Thus, it would be impossible to state unequivocally that an agency such as the Department of Interior or the Environmental Protection Agency does or does not comply with the RFA.

Such scorekeeping dramatically misses the point in any event. The purpose of the RFA is to force agencies to recognize the impact of their rules on small entities in every rulemaking. An agency can be obsessive about compliance with the RFA for almost all of its rules. However, if it fails to comply with the RFA in promulgating a regulation that has dramatic impact on small business, then its failure more than outweighs its successful implementation in most of the other cases.

The recalcitrant agencies discussed in this section do not miss the boat on compliance with some regulations. They cannot even find the ocean. These agencies place in stark relief the obstinacy that can be developed to avoid compliance with the RFA.

A. The Internal Revenue Service

The history of the Internal Revenue Service's (Service) compliance with the RFA has the been the subject of extensive testimony before this committee and has been a "lowlight" of the Chief Counsel's annual report. I will not repastinate those commentaries. Rather, I would like to show why the Service's failure to comply represents such a problem.

The Service proposed regulations that would address perceived abuses by partnerships (Subchapter K entities) in reducing their aggregate tax liability. The proposed rule would apply to all

partnerships of which 88% had gross receipts of less than $250,000. The Commissioner proposed to retain the authority to recast any transaction, even one that was valid when completed and complied with the literal language of the Internal Revenue Code, as abusive. Thus, no small partnership would ever have any certainty with respect to future transactions or, more importantly, past transactions.

It is beyond cavil by all parties, other than the Service, that the rule would have a significant economic impact on a substantial number of small entities. Despite this patent effect on small business, the Service did not perform a regulatory flexibility analysis; rather, the Service resorted to its typical course of considering the regulations as merely interpretative and therefore not within the ambit of the RFA.

B. Procurement Activities

As a general proposition, the APA excludes matters relating to government contracts from the requirements of notice and comment rulemaking. This gap had been used by agencies until 1984 when Congress required that all significant federal contracting regulations be subjected to notice and comment rulemaking. As a result, the major procurement agencies, such as the Department of Defense and the General Services Administration, had to comply with the RFA. Unfortunately their compliance has not been

satisfactory. A brief review of current activities will demonstrate the problems facing small business as a result of the failure to fully grasp compliance with the RFA.

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration published a proposed rule to implement various small business provisions of the Federal Acquisition Streamlining Act. The proposed rules would have a significant economic effect on all small businesses wishing to do business with the federal government. Nevertheless, these agencies failed to perform an initial regulatory flexibility analysis because the rules would be beneficial to small business. Nothing in the RFA permits an agency to avoid its obligations under the Act because the proposals may be beneficial to small business.[9]

In fact, Administrator Lader raised the issue of RFA compliance and the need to cooperate with the Office of Advocacy. As a result of the Administrator's actions, we have been assured of future compliance with the RFA in procurement matters.

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[9] A more detailed discussion of this issue can be found in the 1993 Annual Report and to repeat it here in detail is unnecessary.

C. The Agricultural Marketing Service

Problems with the Agricultural Marketing Service's (AMS) compliance with the RFA has been an issue before this committee. I wish I could say that Congressional pressure seriously modified the behavior of the AMS. It did not. A fuller explanation of the problems the Office of Advocacy has with AMS can be found in this year's annual report and the Acting Chief Counsel's testimony before the Judiciary Committee's Administrative Law Subcommittee. I will not reiterate those remarks. However, I will share one anecdote which demonstrates the serious problems my office faces in trying to obtain compliance with the RFA.[10]

My office has written to AMS on occasions too numerous to count contesting their implementation of the RFA. My staff has had discussions with various staff members of AMS and submitted a nearly 20 page single-spaced memorandum to the Administrator's special assistant concerning AMS compliance. Finally, after repeated missives, the Administrator agreed to meet with me and members of my staff stating "AMS certainly has no desire or intention to ... fail to comply with ... the RFA." Letter of November 8, 1994 from Administrator Hatamiya to Chief Counsel

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[10] AMS regulates, by use of marketing orders, the shipment of billions of dollars of milk, fruits, vegetables, and specialty crops. Thus, its failure to comply with the RFA affects a not insubstantial portion of the agricultural markets in the United States.

Jere W. Glover. A meeting was scheduled for December 20, 1994. On the day of the meeting, the Administrator cancelled without explanation. Further attempts to reschedule were finally met with a decision that the meeting was no longer necessary. However, the most recent issuances from the AMS continue to demonstrate a continuing disregard for the RFA.

The only way to ensure that each rulemaking from every agency complies with both the letter and spirit of the RFA is to make sure that an agency pays a "penalty" for failing to comply with the RFA. The best mechanism for doing that is through judicial review.

IV. Judicial Review of RFA Decisions

As you are well aware, an agency's failure to comply with the RFA is not directly contestable in court. Thus, the RFA differs markedly from all other statutes that dictate the process for arriving at agency decisions. This allows federal agencies, as the annual reports have shown, to ignore compliance with the RFA with impunity. The best mechanism is the threat of litigation over agency compliance with the RFA.

As I have demonstrated, the mere potential entrance by the Office of Advocacy in litigation through its amicus authority led the FCC and the NMFS to modify their regulations and procedures for

complying with the RFA. A more substantial and ongoing threat, potential judicial review of agency compliance with the RFA, would certainly lead to scrupulous compliance with the RFA, just as similar attentiveness is paid to the impact statement requirements of the National Environmental Policy Act (NEPA).

Historically, the gravest opponents of judicial review have been federal agencies. Rather than viewing the RFA as a beneficial tool, they find it akin to the albatross that figuratively hung around the neck of the Ancient Mariner. The agencies are concerned that this might lead to a barrage of lawsuits and are concerned that full compliance will slow the process of regulatory development.

Congress enacted the APA to force agencies to draft regulations only after acquiring hard facts or data concerning the problem to be addressed. Failure to acquire these facts or data, which can come to light as a result of performing a regulatory flexibility analysis, should be a telltale sign to the agency that it should stop and reexamine the problem before heading forward with a particular solution. Compliance with the RFA slows down the rulemaking process only where the agency has not done a proper analysis as mandated by the APA and collected the appropriate data needed to analyze various options to the proposed rule.[11]

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[11] The FCC's implementation of the Cable Act demonstrates the folly of trying to develop a regulatory scheme within a short
(continued...)

If compliance with the RFA demonstrates that an agency does not have the support needed to implement a particular regulatory initiative -- so be it.

The fears of judicial review are overstated. Unlike NEPA, interlocutory review of agency compliance would not occur because final agency action has not occurred and parties have failed to exhaust their remedies, i.e., bring to the attention of the agency the failure to comply with the RFA. Second, the cost of litigation would be so large that small businesses would use the provision only to contest the most egregious agency actions. Third, given the current method for challenging final rules, most complaints about RFA compliance would be brought as a separate claim in a challenge to agency rulemaking pursuant to the APA. Thus, the number of potential lawsuits challenging agency regulations would be no greater than they are today. What would change is the likelihood of success in court because it is far easier to demonstrate that an agency failed to comply with proper procedures than demonstrate that the solution ultimately chosen by the agency is arbitrary and capricious. Of course agencies could avoid that pitfall through full compliance with the RFA.

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[11](...continued)
time frame. However, in that circumstance, the FCC was trying to comply with statutory deadlines issued by Congress. Still it took nearly a year and numerous reconsiderations to finalize rate regulations, at least for large cable operators. Small operator rules are still in flux because the FCC has not accumulated the needed data to finalize them. Most small operators function using regulations aimed at large operators.

Thus, judicial review provides agencies with a significant incentive to comply fully with the RFA -- something they do not have today.

V. Comments on Regulatory Flexibility Provisions of H.R. 9

One of the questions asked in the invitation letter was my opinion of the Regulatory Flexibility Act Amendments contained in H.R. 9. I believe that the posture I have taken since arriving at the Office of Advocacy has been consistent. I am more committed to judicial review than the exact language of a bill. In that regard, I believe that the provisions in H.R. 9 which are the same as those introduced by Congressman Ewing in 1993 would accomplish the primary objective of obtaining judicial scrutiny.[12] Similarly, I believe that various versions of amendments to the RFA floated by the Administration and others also would achieve that goal.

Distinctions between the bills may be appropriate grist for administrative legal scholars using Ockham's razor to parse distinctions so fine they become unmeasurable by atomic physicists. Rather than becoming enmired in that debate and endlessly arguing over the most elegant solution, I strongly urge that legislation be enacted forthwith so the Office of Advocacy

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[12] Other provisions, such as § 4003, which expands the RFA to large businesses is counterproductive.

can turn its attention to ensuring that agencies comply with the RFA rather than be sued for failing to do so.

However, I do have one recommendation with respect to H.R. 9 or any bill that amends the RFA. My § 612 authority states that I am authorized to submit an amicus brief on the "effect" of the rule on small business. I believe that should be clarified to mean the effect on small business or the validity of the rule under the APA. It is nearly impossible to discuss one without the other.

VI. Conclusion

In 1946, Congress took a giant step forward by standardizing the decisionmaking process used by federal agencies. That Congress and subsequent court decisions demanded that agencies exercise their rulemaking authority in a rational manner. In 1980, Congress recognized that the concerns of small entities, the largest segment of the regulated community in terms of sheer number, were being ignored in the rulemaking process. Congress determined that without appropriate consideration of their concerns rational rulemaking could not occur. However, for whatever reason, that Congress decided not to provide the necessary teeth to force federal agencies to take small entity concerns into consideration when promulgating regulations.

I believe that the time is appropriate to take the necessary steps to force such compliance. Jawboning by my office and OIRA as a result of Executive Orders by three Presidents, while sometimes successful, is not a guaranteed solution and does not address very effectively the problems posed by independent agencies. Only the threat of judicial scrutiny will ensure that agencies will comply with the letter and spirit of the RFA. Even judicial scrutiny will not resolve all regulatory burdens faced by small business until Congress applies the principles of the RFA when it enacts legislation.

I am pleased to answer any questions the Committee may have.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

January 11, 1995

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

Honorable Jere Glover
Chief Counsel for Advocacy
Small Business Administration
Washington, D.C. 20416

Dear Mr. Glover:

Over the past few months, we have been discussing ways in which the Office of Information and Regulatory Affairs can assist your Office in monitoring agency compliance with the Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6). Based on these discussions, we suggest the following ways in which we can establish an effective working relationship:

1. SBA Guidance and Training.

We are ready to provide assistance at your request in your development of guidance for agencies to follow in complying with the RFA. In particular, our economists will be available to help you develop guidance for an agency's preparation of a regulatory flexibility analysis. Similarly, our economists will be available to participate in any training sessions that you offer involving compliance with the analytical requirements of the RFA.

2. OIRA Review of Agency Regulations under E.O. 12866.

A. In our prepublication review of an agency's Notice of Proposed Rulemaking (NPRM), we will consider whether the agency should have prepared an initial regulatory flexibility analysis. If it appears to us -- in light of your RFA guidance -- that you may have a concern in this regard, we will provide you, consistent with our obligation to assure adequate interagency coordination, with a copy of the draft NPRM. Upon request, we will provide you with specific draft proposals with accompanying regulatory analyses. If you have a concern, you will need to consult with the issuing agency to see if your concern can be resolved.

If, after your discussions with the issuing agency, you continue to have a concern, we ask you to let us know. Similarly, if, after an agency provides you an initial regulatory flexibility analysis that you find inadequate or a rule with an inadequate certification that you believe would be inadequate based on the provisions of E.O. 12866, we ask you to let us know. As a general matter, we prefer not to conclude our review under

E.O. 12866 while there is an ongoing interagency dispute. If we agree that the terms of the RFA have not been met, we will discuss our concerns with the agency.

B. Once an agency has published an NPRM, you may have a concern that the agency should have prepared a regulatory flexibility analysis or a concern with the adequacy of the analysis itself. This could be true both for an NPRM that we reviewed under E.O. 12866 and for one that we did not. In either case, we ask that you let us know of your concerns. We will also be prepared to discuss with you whether, under the circumstances, we should seek to have the agency take remedial action (including republication of the NPRM) to permit a more informed opportunity for public comment.

If your concerns involve an NPRM that we had not reviewed because it had not been considered "significant" under section 3(f) of E.O. 12866, we will -- if we learn of your concerns in a timely manner -- reconsider that determination to decide if it would be appropriate for us to review that regulation in its final form. If your concerns involve an NPRM issued by an agency that has been exempted from E.O. 12866 or that is not subject to its terms, we will discuss with you possible courses of action that may help resolve your concerns.

If you have an RFA concern with an information collection contained in an NPRM, which we are reviewing under the Paperwork Reduction Act (44 U.S.C. chapter 35), please let us know. If we agree that the terms of the RFA have not been met, we will discuss our concerns with the agency.

C. In our prepublication review of an agency's final rule, we will undertake actions similar to those discussed in subsection (A), above.

3. SBA Monitoring of RFA Compliance.

We ask that you provide us with a copy of any correspondence or formal comments that you file with an agency concerning RFA compliance -- either in the context of a particular rulemaking or more generally.

We look forward to working with you as you monitor agency compliance with the Regulatory Flexibility Act.

Sincerely,

Sally Katzen

Sally Katzen

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

January 11, 1995

Honorable Sally Katzen
Administrator
Office of Information and
Regulatory Affairs
Washington, D.C. 20503

Dear Ms. Katzen:

Over the past few months, we have been discussing ways in which the Office of Information and Regulatory Affairs can assist us in monitoring agency compliance with the Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6). Based on these discussions, we suggest the following ways in which we can establish an effective working relationship:

1. SBA Guidance and Training.

We will develop guidance for agencies to follow in complying with RFA. We will also offer assistance to agency personnel on compliance with the RFA. If the occasion arises, we may want assistance from OIRA staff familiar with economic analysis.

2. OIRA Review of Agency Regulations under E.O. 12866.

A. If, during OIRA's prepublication review of an agency's Notice of Proposes Rulemaking (NPRM) under E.O. 12866, you wish to consult with us on whether an agency should have prepared an initial regulatory flexibility analysis, we invite you to do so. We will designate staff by issue or agency or both to facilitate such discussions. If you send us a copy of the draft NPRM, we will evaluate it to make our own determination. From time to time, we may request specific draft proposals with accompanying regulatory analyses. If we have concerns, we will consult with the issuing agency to resolve our concerns.

If our discussions with the issuing agency do not result in an acceptable accommodation, we will seek your assistance. If appropriate, we will recommend that you raise these concerns with the proposing agency.

B. We will also review NPRMs that agencies publish in the Federal Register to monitor agency compliance with the RFA. Similarly, we will review the initial regulatory flexibility analyses that agencies provide us to determine their adequacy

under the RFA. If we find an NPRM that does not comply with the RFA, we will discuss our concerns with you. If the circumstances warrant, we will ask you to have the agency take remedial action (including republication of the NPRM) to permit more informed opportunity for public comment.

If our concerns involve an NPRM that you had not reviewed because it was not consider "significant" under section 3 (f) of E.O. 12866, we may ask that you reconsider that determination to decide if it would be appropriate for you to review that regulation in its final form. If our concerns involve an NPRM issued by an agency that has been exempted from the Executive Order or that is not subject to its terms, we may seek your guidance on possible courses of action available to us.

C. During your prepublication review of an agency's final rule, we will undertake actions similar to those discussed in subsection (A), above.

3. SBA Monitoring of RFA Compliance.

We agree to provide you with a copy of any correspondence or formal comments that we file with an agency concerning RFA compliance -- either in the context of a particular rulemaking or more generally.

We look forward to working with you in our monitoring of agency compliance with the Regulatory Flexibility Act.

Sincerely,

Jere W. Glover

Jere W. Glover

U.S. Small Business Administration
Office of the Chief Counsel for Advocacy

Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, Calendar Year 1993

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Contents

Abbreviations

ACF	Administration for Children and Families
AMS	Agricultural Marketing Service
APA	Administrative Procedure Act
CG	Coast Guard
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
ED	Department of Education
FDA	Food and Drug Administration
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FERC	Federal Energy Regulatory Commission
FMLA	Family and Medical Leave Act
FNS	Food and Nutrition Service
FONSI	finding of no significant impact
FS	Forest Service
FSIS	Food Safety Inspection Service
FWS	Fish and Wildlife Service
HCFA	Health Care Financing Administration
HHS	Department of Health and Human Services
INS	Immigration and Naturalization Service
IRS	Internal Revenue Service
NEPA	National Environmental Policy Act
NHTSA	National Highway Traffic Safety Administration
NMFS	National Marine Fisheries Service
NPR	National Performance Review
NRC	Nuclear Regulatory Commission
OMB	Office of Management and Budget
PCS	personal communication services
PHS	Public Health Service
RFA	Regulatory Flexibility Act
RSPA	Research and Special Programs Administration
USDA	U.S. Department of Agriculture
WHD	Wage and Hour Division

To the President and Congress of the United States:

The Chief Counsel for Advocacy of the U.S. Small Business Administration is charged by the Regulatory Flexibility Act with the responsibility of monitoring federal agencies' compliance with the act and reporting annually to the President and Congress.

I am pleased to submit to you this report covering activities undertaken during calendar year 1993.

In 1993, the Office of Advocacy participated in 57 rulemakings. In some instances our participation included substantive comments about agency proposals. In other instances, our comments pointed out an agency's failure to follow proper procedure in complying with the act. This report also analyzes some generic problems with the Regulatory Flexibility Act that have been uncovered by the Office of Advocacy since the law's enactment in 1980.

Over the past 13 years, the Regulatory Flexibility Act has helped ease the regulatory burden on small entities. It will only be through continued, vigorous monitoring of the regulatory activities of federal agencies that we can ensure that federal regulations, while accomplishing their intended purposes, do not unduly inhibit the ability of these small entities to compete.

Jere W. Glover
Chief Counsel for Advocacy
U.S. Small Business Administration

Executive Summary

The chief counsel for advocacy is charged with monitoring agency compliance with the Regulatory Flexibility Act (RFA) and reporting to Congress and the President on these activities; this report is submitted in compliance with that mandate. In furtherance of Advocacy's responsibility to ensure agency compliance, this report discusses RFA integration into the agency decisionmaking process and suggests areas for reform.

The Office of Advocacy participated in 57 agency rulemakings in 1993. In some instances, Advocacy's participation included substantive comments about agency proposals. In other instances, the comments simply pointed out the agency's failure to follow proper procedure in complying with the RFA. This report focuses on Advocacy's substantive comments during 1993, but also analyzes generic problems with the RFA that have been uncovered by the Office of Advocacy since passage of the act in 1980.

Section I of this report provides an overview of the Regulatory Flexibility Act. Problems with the RFA, including coverage, certification, and alternatives are discussed in Section II. Section III suggests legislative and managerial changes that should be examined to correct problems with the RFA. Section IV of the report analyzes the impact of the RFA on specific agency proposals in 1993. The appendix lists the comments filed by the Office of Advocacy during calendar year 1993.

Several events in 1993—such as the release of Vice President Al Gore's National Performance Review report—provided greater impetus to amending the Regulatory Flexibility Act. The chief counsel is taking the opportunity in this report to analyze those events and the need for modification of the RFA. To further explain the need for alteration of the RFA, this report uses examples from 1993 and from previous years. Before examining the act in great detail, an exegesis on the reasons for passage and operation of the Regulatory Flexibility Act is provided.

The Regulatory Flexibility Act

A. Purpose

The Regulatory Flexibility Act (RFA) and the analytical requirements it mandates are designed to require federal agencies to articulate the effects of their proposed and final rules on small entities. This process should be viewed as an integral component of the administrative process in the same vein as compliance with notice and comment procedures or presidential executive orders. The RFA must be viewed as part of a means to an already designated end dictated by Congress, implemented by the executive branch, and overseen by the courts—reasoned agency decision making.

Congress enacted the Administrative Procedure Act (APA) in 1946 to prevent ad hoc agency decision making.[1] The primary mechanisms for doing this are the notice and comment procedures in Section 553 of the APA. The input received from interested parties during the comment period educates agencies and helps ensure informed agency decision making.[2] The RFA works in conjunction with notice and comment rulemaking to help ensure that agencies make informed decisions on those rules affecting small businesses. The RFA is based on two premises: (1) that federal agencies often do not recognize the effect that their rules will have on small businesses, and (2) that small entities are disproportionately disadvantaged by federal regulation compared with their larger counterparts.

Little doubt exists with respect to the second point. A simple example will demonstrate its veracity: if the costs of compliance are fixed, the smaller entity will suffer more severely because it has a smaller output over which to recover the costs; i.e., the costs per

1. Morton v. Ruiz, 415 U.S. 199, 232 (1974).

2. Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985); National Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978).

unit of output increase for the firm with a smaller output.[3] This translates directly into raising the smaller firm's marginal cost of production and reducing its ability to set competitive prices, expand and create jobs, devise innovations, or, depending upon the structure of the market, continue as a viable organization.[4]

B. Agency Analysis of Proposed Rules

The RFA was enacted to obtain federal agency recognition of the impact of these effects and to require that steps be taken to examine means to alleviate them. The theory behind this process is that if agencies have the choice of selecting two different methods of meeting their statutory obligations, they will opt for the procedure that is less burdensome on small business. Of course, this premise fails if the agency does not conduct an evaluation of available alternatives. Thus, compliance with the RFA is a two-step process.

First, the agency must make a threshold determination of whether the proposed or final rule will have a significant economic impact upon a substantial number of small entities. This determination requires the agency to examine data on the number of small entities in the regulated community, the number that will be affected by the regulation, and the monetary impact that the regulation will have on small entities. Without such data, the Office of Advocacy sees no way for a federal agency to reach the threshold determination. Nor is the accumulation of such data an extraordinary action. A failure to uncover basic economic data about the industry an agency proposes to regulate is tantamount to agency admission that it does not know the scope of the problem it is trying to ameliorate.

Second, if the agency concludes that the rule will not have a sig-

3. The evidence of scale economies in regulatory compliance has been confirmed by a study commissioned by the Office of Advocacy. Todd A. Morrison, *Economies of Scale in Regulatory Compliance: Evidence of the Differential Impact of Regulation by Firm Size*, prepared by Jack Faucett Associates for the U.S. Small Business Administration, Office of Advocacy, report no. PB85-178861 (Springfield, Va.: National Technical Information Service, 1984). The study found that scale economies exist in complying with regulations as diverse as aluminum to truth-in-lending regulations.

4. Similar problems face small entities other than businesses. Small governmental jurisdictions that must use scarce resources to ensure compliance with government regulations must reduce the services that they provide to their communities. As unfunded mandates increase, the compliance problems of small governmental jurisdictions will be exacerbated.

nificant economic impact upon a substantial number of small entities, the agency may certify to that effect. Announcement of the certification is required in the *Federal Register* and the certification must be accompanied by "a succinct statement explaining the reasons for such certification . . . . "[5] The statement must provide sufficient analysis to apprise the regulated community of the reasons for the certification.

An alternative second step is necessary if the agency determines that the proposal will have a significant economic impact upon a substantial number of small entities. Under this circumstance, the agency must prepare an initial regulatory flexibility analysis. The analysis must contain: (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of, and, when feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping and other compliance requirements for the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for preparation of the report or record; and (5) an identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.

These provisions merely reiterate requirements of other statutes such as the APA or the Paperwork Reduction Act. By themselves, these provisions do not sufficiently focus on the problems faced by small entities.

The most important requirement specified in the RFA mandates that an agency describe and examine significant alternatives to the proposal that accomplish the objectives of the agency but minimize the economic impact on small entities. Significant alternatives may include, but are not limited to: (1) establishment of diverse compliance or reporting requirements that take into account the resources available to small entities; (2) performance rather than design standards; or (3) exemptions of small entities from all or part of the rule.

Assuming that the agency, after comments, still determines that a rule will have a significant economic impact upon a substantial number of small entities, it is required to prepare a final regulatory flexibility analysis. The final regulatory flexibility analysis must discuss comments received during the comment period from interested parties and the alternatives considered by the agency. Often issues

5. U.S.C. § 605 (b).

raised in the initial regulatory flexibility analysis are integrated into the final analysis. However, the RFA specifically requires agencies to: (1) summarize the issues raised by the public comments; (2) summarize the agency's assessment of those comments; (3) state any changes made in the proposed rule as a result of the comments; (4) describe each of the significant alternatives to the rule consistent with the regulatory objectives; and (5) state why each one of the alternatives was rejected. Unlike the initial analysis, a final analysis or summary thereof need not be published in the *Federal Register*; rather, the agency need only make it available to the public and tell the public how the final analysis can be obtained.

II. Problems with the RFA

The RFA is a relatively short statute. Yet, despite its brevity, numerous difficulties have arisen within agencies in interpreting and implementing the RFA. Some of these problems are related to the specific language of the statute; others are the result of agency indifference to the mandate in the RFA. In either case, the history of implementation of the RFA has been very troubled. As will be seen later in this report, 1993 was a typical year in terms of RFA compliance.

A. The RFA's Coverage

The RFA only requires federal agencies to comply with the act when they are mandated to issue notice and comment rulemaking under the APA or any other law. The APA has numerous exceptions to its notice and comment requirements, and the interpretation and use of these exceptions raise numerous questions for agencies in complying with the RFA. In particular, many agencies certify rules that have absolutely no consequence to small entities. Thus, these agencies, rather than determining whether the RFA applies, simply insert the RFA as another "meaningless" paragraph in the *Federal Register*.

If agencies are unwilling to make the needed determination of RFA applicability, it is no great leap in logic to assume that little effort will be made to perform an appropriate analysis when the RFA does apply to a specific rulemaking. Agency failure to apply proper scrutiny in the rulemaking process can best be examined by reviewing agency action when the APA does not require notice and comment rulemaking.

1. Section 553(a) Exceptions—APA

Agencies issue many rules that have only a tangential effect on the public. The APA recognizes this by providing an exemption from notice and comment rulemaking for regulations that concern agency management and personnel. The APA also provides an exemption from notice and comment rulemaking for regulations involving

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loans, grants, benefits, and public property. Because regulations covering these subjects are not subject to notice and comment rulemaking, the RFA does not apply.[6]

Despite the inapplicability of the RFA to these rulemakings, the Office of Advocacy has seen a consistent pattern in which such regulations are nevertheless certified that they do not have a significant economic impact upon a substantial number of small entities. In many instances of rules that are subject to a Section 553(a) exception, the Office of Advocacy suspects that the federal agencies, rather than run the risk that the effect of a rule will lapse if there is noncompliance with the RFA, take the safe route of certifying rules irrespective of whether the particular rulemaking requires RFA compliance.[7]

While the Office of Advocacy suspects that most agencies are certifying regulations to avoid the possible lapse of a rule under Section 608, another explanation may be possible. Many agencies have issued a regulation requiring that all rules be promulgated by notice and comment rulemaking.[8] Because such a rule is binding on the agencies, they may then interpret it "as any other law" requiring the agency to comply with the RFA. While this then requires agencies to comply with the RFA in circumstances that may affect the public, such as management of public property or the issuance of loans, it also requires agencies to expend resources for RFA compliance in those instances that have no effect on the public, such as rules regarding internal agency personnel decisions. The Office of Advocacy believes that the application of the RFA must be clarified in this circumstance.

6. While the APA does not mandate that issues of federal government procurement be issued pursuant to notice and comment rulemaking, the Small Business and Federal Procurement Competition Enhancement Act of 1984 requires that significant federal procurement policy initiatives be issued through notice and comment rulemaking. This statute is a law requiring notice and comment rulemaking; as a result, the RFA applies to issuances covered by the statute.

7. Section 608 of the RFA states that the effectiveness of a final rule will lapse after 180 days if a final regulatory analysis has not been prepared or the agency head has not certified the rule pursuant to § 605(b).

8. For example, the vast majority of regulations issued by the U.S. Small Business Administration are in categories exempt from the APA's notice and comment rulemaking proceedings. However, the SBA has adopted a regulation requiring that most rules be issued subject to the APA's notice and comment provisions. 13 C.F.R. § 101.9. Other agencies also have adopted rules requiring them to comply with notice and comment procedures when they are not required to do so by the APA. *See* Rodway v. USDA, 514 F.2d 809, 813 (D.C. Cir. 1975).

2. Section 553(b) Exceptions—APA

The APA also provides for exceptions to notice and comment rulemaking for those regulations that are considered interpretative or those issued for immediate effectiveness because good cause exists to forgo notice and comment rulemaking. Both exceptions have proved particularly troublesome in obtaining agency compliance with the RFA.

a. Interpretative Rules and the IRS

Interpretative rules issued by the Internal Revenue Service (IRS) are not subject to the RFA. Thus, the IRS can avoid the strictures of the RFA simply by denominating their rules as interpretative.[9]

Interpretative rules can and often do have a substantial impact on the entities subject to the rules. This is especially true in the case of interpretative rules issued by the IRS which can affect every small entity in the country. Yet, most small entities have neither the financial nor legal wherewithal to challenge the interpretation in court. Given the choice of complying with the IRS' interpretation of a provision of the tax code or challenging it in court, a small entity will invariably follow the IRS's interpretation unless the impact is so severe that it threatens the very existence of the entity. Very few rules will meet that "betting the company" litigative threshold. The IRS has characterized its rules as interpretative despite the obvious impact that many IRS rulemaking decisions have on small entities, particularly small businesses. In doing so, the IRS can avoid compliance with the RFA. If the IRS rulemaking process adequately considered the impact on small entities without utilization of the RFA, then its failure to comply with the RFA would be, at best, a technical oversight. However, the IRS's rulemaking procedures do not adequately consider the impact on small entities and characterizing its rules as interpretative frustrates the intent of the RFA.

An examination of the IRS's revision to the federal tax deposit rules is illustrative. Section 6302 of the Internal Revenue Code, under which the tax deposit regulations were issued, is an extraordinary example of tax code brevity and clarity. This section simply states that the "mode or time for collecting any tax . . . the secretary may establish the same by regulation." In issuing regulations on federal tax deposits by employers, the IRS simply determined that the

9. The chief distinction between these rules and rules subject to notice and comment under the APA is that these rules are not given the same level of judicial deference. Violations of interpretative rules can be tested in litigation in which the court can substitute its own interpretation for that of the agency's, something it is not permitted to do in reviewing substantive rules. *See, e.g.*, Doe v. Revitz, 830 F.2d 1441, 1446-47 (7th Cir. 1987).

rules were interpretative and compliance with the RFA was not necessary. The IRS was given broad authority to write rules that can have a major impact on small business; this kind of rulemaking is a perfect example of the kind of rule that should be covered by the RFA.

The IRS's determination that regulations reaching every employer in the United States should be considered interpretative countervenes prevailing views in other agencies concerning the denomination of rules as interpretative. Far less expansive language than that used in the Internal Revenue Code—such as in the Clean Air Act of 1990, the Nutrition Labeling and Education Act, and the Family and Medical Leave Act—grants substantive rulemaking authority when implementing the statute. The IRS's designation of an action as interpretative removes the logical responsibility from the IRS to examine the impact of its actions on small entities and develop potential alternatives that may reduce such burdens.

The IRS faces a difficult task in issuing regulations implementing tax code changes in a timely fashion. Regardless, the IRS must recognize that its interpretations have substantial impacts on small entities and—like every other federal agency—it must be required to comply with the analytical requirements dictated by Congress. As James Madison stated: "you must first enable the government to control the governed; and in the next place oblige it to control itself." That statement is as apt today when applied to the IRS as it was when Madison said it nearly 200 years ago.

Currently, Section 7805 of the Internal Revenue Code is the only mechanism that the Office of Advocacy can use to examine the small business impacts of an IRS pronouncement. That section requires the IRS to submit to the Office of Advocacy all proposed rules and to respond to any Advocacy comments. This procedure is not a substitute for compliance with the RFA. The Office of Advocacy does not have the resources to review the economic impact of all regulations issued by the IRS. Nor does responding to our comments in the final regulation constitute an analysis of the impact of the rules on small entities.[10] Thus, while Section 7805 may be useful in opening a dialogue between Advocacy and the IRS, it is not adequate to ensure that the IRS consider the impact of regulations on small entities.

10. The response could be as simple as an IRS statement disputing Advocacy's contention.

b. "Good Cause Exception" and USDA

The APA provides that regulations may be issued without notice and comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest . . . ." Therefore, agencies need not comply with the RFA when issuing these rules because the RFA only applies to those regulations that must be issued pursuant to notice and comment rulemaking. For the most part, agencies use this exception sparingly as intended by the authors of the APA and the Office of Advocacy does not believe that the correct use of the exception creates undue burdens for small entities.

However, this exception is sometimes used when good cause does not exist. In such instances, agencies may utilize the RFA certification to improperly bolster their argument that notice and comment is unnecessary because the impacts are insignificant.[11] This type of activity is most prevalent at the U.S. Department of Agriculture (USDA).

One recent example of the improper use of certification involved an interim final rule issued by the Food Safety Inspection Service (FSIS) requiring the affixation of safe-handling instructions on raw meat and poultry products. The FSIS issued the rule on an interim final basis.[12]

The Office of Advocacy filed comments on the interim final rule. In those comments, Advocacy criticized the FSIS for underestimating the impact of the regulation on small businesses. The Office of Advocacy also objected to the use of an interim rule when no emergency existed. The Office of Advocacy's comments were extensively cited in briefs challenging the FSIS action. The FSIS argued that good cause was shown in order to protect the public health and found that there was no significant economic impact imposed by the interim rule on businesses, particularly small businesses. Affected entities challenged the rule and the court, in *Texas Food Industry Association v. USDA,* 842 F. Supp. 254 (W.D. Tex.

11. Implicit in this determination is that certain regulations issued by an agency, such as the USDA, only regulate small businesses. If the agency finds that the impacts will be insignificant, then public comment will not reveal any necessary changes to the proposed rule. Thus, an agency may utilize a certification determination to bolster its conclusion that good cause exists to forgo notice and comment rulemaking. Of course, if the agency's determination is incorrect concerning economic impact, then the failure to seek notice and comment eliminates the only possible mechanism to discover an agency's error.

12. Interim final rules are issued for immediate effectiveness, generally to meet statutory or court-imposed deadlines. Comments are received and the agency can then consider those comments when a permanent final rule is adopted.

1993), found that good cause did not exist and that small businesses may face irreparable harm due to the disproportionate impact that the labeling rule would have on them. The court, in essence, agreed with comments filed by the Office of Advocacy and invalidated the rule. The FSIS decided to promulgate regulations after a period of notice and comment.

The FSIS rule was not an isolated incident at the USDA. The Agricultural Marketing Service (AMS) regularly utilizes the certification strategy to bolster its conclusion that it is unnecessary to perform notice and comment rulemaking.[13] Two examples from the AMS's oversight of marketing orders will illustrate the Office of Advocacy's concern.

A marketing order for California and Arizona navel oranges authorizes the secretary of agriculture (who has delegated this authority to AMS) to establish weekly limits on the amount of oranges that may be shipped to the fresh domestic market. The AMS issued these rules on a weekly basis for more than 30 years pursuant to the APA's good cause exception.[14] The AMS claimed that it was impossible to issue weekly rules and still satisfy the notice and comment requirements of the APA. Implicit in the AMS determination was a conclusion that notice and comment was unnecessary because the rules do not have a significant economic impact on small businesses and no rational modification of the rule would have occurred had there been notice and comment rulemaking. In *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992), the court found that the AMS did not establish good cause to forgo notice and comment rulemaking and that the rules on orange shipments must be issued pursuant to notice and comment and compliance with the RFA.

The AMS used somewhat similar reasoning in the issuance of advertising regulations under the almond marketing order. The AMS justified the issuance of these regulations without notice and comment pursuant to the good cause exception, claiming that affected

13. Marketing orders are issued by the USDA under the authority of the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601–24. They regulate, through quantity or quality controls or both, the shipment of various fresh fruits, vegetables, and specialty crops. Some 46 orders regulate more than $4 billion worth of crops.

14. There were two periods in which the secretary suspended operation of these shipment controls due to weather-induced shortages. In 1993, Secretary Espy announced an indefinite suspension of these shipment controls until problems witn the order were resolved.

entities were aware of the regulations and had an opportunity to express their views at a meeting in California. In essence, the AMS's rationale for good cause was that parties had an opportunity to comment at an open meeting of the Almond Board of California and that no objections were made to the rule because their impact was insignificant.[15] Ergo, good cause is established. In a challenge to the order, the court in *Cal-Almond, Inc. v. USDA*, 14 F.3d 429 (9th Cir. 1993), scoffed at the AMS rationale and held that good cause to forgo notice and comment rulemaking was not established. Again the USDA's failure to undertake notice and comment rulemaking prevented it from discovering the true implications of its order on small businesses.[16]

B. Certification of Positive Impacts

The RFA requires agencies to prepare initial and final regulatory flexibility analyses whenever they find that the proposed or final rule will have a significant economic impact upon a substantial number of small entities. The act does not distinguish between positive and negative economic impacts and some legislative history exists to support the contention that the statute is impact-neutral. On the other hand, Section 604 provides that a final regulatory flexibility analysis examine alternatives that are "designed to minimize any significant economic impact . . . ."

This ambiguity has created some consternation for agencies that attempt to both comply with regulations and help small entities. Examples from two agencies will help illustrate the point. In late 1993, the U.S. Department of Justice, Immigration and Naturalization Service (INS), issued a final rule reducing the number of documents that can be used to verify citizenship under the Immigration Reform and Control Act. The INS determined that this will reduce the paperwork burdens for all businesses, particularly small businesses. Thus, the rule will have positive economic impacts upon

15. The Almond Board of California consists of members of the industry charged with making recommendations to the AMS on implementation of the order.

16. The AMS also simply asserted that the advertising rules would not have a significant economic impact upon a substantial number of small entities. The Office of Advocacy on a number of occasions contested that finding. In *Cal-Almond*, the court found that the advertising rules were designed to benefit the largest handler at the expense of smaller handlers and that they had a serious effect on small business. 14 F.3d at 440.

small entities. Similarly, the Federal Energy Regulatory Commission (FERC) issued rules concerning blanket marketer certificates for natural gas sellers. FERC certified the proposed rules, in part, because they will reduce the cost to non-pipeline sellers of natural gas. In another example, FERC certified rules governing the filing of applications for exempt wholesale generator status under the Public Utility Holding Company Act. FERC contended, inter alia, holders of this status will enjoy substantial regulatory benefits.

In the aforementioned rulemakings, neither the INS nor FERC met the statutory requirements in the RFA. Although the rules have obvious beneficial effects that would be significant, the agencies should have prepared a final regulatory flexibility analysis to reassure the public that the chosen alternative was indeed the best alternative. Thus, the agencies should have prepared a final regulatory flexibility analysis.

Equally problematic is the situation in which there is no other alternatives that maximize impact. In the Office of Advocacy's comments to FERC on the blanket marketer certificate rule, Advocacy noted that no other alternative may exist that maximizes the positive impact of the rule. If no such alternatives exists, then the agency's attempt to analyze alternatives is futile. If the agency cannot comply with one of the analytical requirements for a final regulatory flexibility analysis, it may decide that certification is the preferable route. However, using certification when no other alternative exists may prevent an agency from obtaining valuable information that may be useful in other contexts.

The Food and Drug Administration (FDA) utilized a regulatory flexibility analysis, among other evidence, to obtain modification of the Nutrition Labeling and Education Act. In implementing the food labeling requirements of that act, the FDA prepared a regulatory flexibility analysis which concluded that small food manufacturers should be exempt. However, the statute severely restricted the size of business eligible for an exemption and the FDA could not provide a higher statutory standard. Although the FDA wanted to provide a broader exemption, that beneficial alternative was statutorily forbidden. This finding provided the impetus for Congress to increase the size of businesses eligible for the small business exemption. Therefore, although the analysis did not result in a different regulatory regime, it ultimately led to changes beneficial to small entities.

The applicability of the RFA with respect to positive economic impacts should be clarified. Agencies must be required to examine whether other alternatives exist that further enhance the positive economic impacts of a rule. If no such alternatives exist, then the

analysis performed by the agency should be directed at demonstrating that the proposed or final rule is the best alternative for small entities. These two modifications will ensure that federal agencies are doing what the authors of the RFA intended—fully considering the impact of their rulemakings on small entities.

C. Boilerplate Certifications

An agency decision to certify means it has found that the proposed or final rule will not have a significant economic impact upon a substantial number of small entities. This should mean that the agency has performed some type of threshold analysis examining the number of small entities affected and the impact that the proposed or final rule will have on agencies.[17] Unfortunately, the theory behind the RFA certification and the practical experience demonstrate a very different and troubling result.

Many agencies decide to use boilerplate certifications. The Federal Energy Regulatory Commission has modified its procedures from providing a statement explaining a certification decision to a simple assertion that a rule will not have a significant economic impact upon a substantial number of small entities. *E.g.*, Standards of Conduct and Reporting Requirements for Transportation and Affiliate Transactions of Natural Gas Pipelines, 59 Fed. Reg. 268 (1994).[18] Other agencies that have used boilerplate certifications in the past

17. In this sense, the certification decision is equivalent to a finding of no significant impact under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331–44 (NEPA). NEPA requires federal agencies to assess the impact of major federal actions on the environment and examine alternatives to mitigate them. *Id.* at § 4332(c). Regulations implementing NEPA require agencies to perform environmental assessments. 40 C.F.R. §§ 1501.4, 1508.9. The purpose behind the assessment is to determine whether an agency should prepare an environmental impact statement. If the environmental consequences uncovered in the assessment are not sufficiently significant to require the preparation of an impact statement, the agency is authorized to make a finding of no significant impact. Thus, the assessment provides both the agency and potentially affected parties with a document providing a threshold analysis of the environmental consequences of a proposed rule. The analogy between assessments and certifications is particularly apt because one of the primary sponsors of the RFA modeled it after NEPA.

18. Despite the Office of Advocacy's consternation over the use of boilerplate certifications, FERC remains one of the more responsive small entity concerns. In its final rules, FERC will address, and often modify, its regulations to take account of concerns by small entities that may have been overlooked in the drafting of a proposed rule.

year include the Food and Nutrition Service, the Forest Service, the Bureau of Indian Affairs, and the Departments of Transportation and Justice.

The Office of Advocacy is powerless to force agencies to provide concise statements explaining their rationale. The Office of Advocacy concurs with the recommendation of the General Accounting Office that the Office of Management and Budget prohibit publication of proposed or final rules that do not comply with the provisions of Section 605(b) of the RFA.[19]

D. Inadequate Assessment of Alternatives

The heart of the RFA is the requirement to examine alternatives that mitigate the impact of regulations on small entities. Agencies often properly arrive at the conclusion that the proposed or final rule will have a significant economic impact upon a substantial number of small entities. However, many agencies then fail to examine alternatives or do not examine the breadth of available alternatives. This omission creates compliance problems with both the APA and the RFA.

The premise of the APA is that notice and comment rulemaking will provide agencies with sufficient information from the regulated community for the agency to select the best option that meets the statutory mandate of the agency.[20] The RFA assists in that function by forcing the agency to identify those options that mitigate harm to small entities and still accomplish the mission of the agency. If an agency has two courses of action, each of which is rational, and one action imposes a lower burden on small entities, the best decision for the agency and the regulated community is to adopt the least burdensome alternative.

During the 13 years in which the RFA has been in effect, the Office of Advocacy often has noted in comments an agency's failure to examine certain alternatives or a wide range of alternatives. The National Marine Fisheries Service and the Environmental Protection Agency are two examples of agencies that recognized the impact of their proposals on small businesses but failed to examine a wide va-

19. U.S. General Accounting Office, *Regulatory Flexibility Act: Status of Agencies' Compliance*, report no. GGD-94-105 (Washington, D.C.: April 1994) 19.

20. National Ass'n of Reg. Util. Comm'rs v. FCC, 737 F.2d 1095, 1124 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

riety of options.

The National Marine Fisheries Service (NMFS) develops comprehensive plans for the management of fisheries within the jurisdictional waters of the United States. One such plan was adopted for the numerous fish species in the North Atlantic. Serious overfishing led to depletion of fish stocks and the NMFS developed an amendment to the fish plan to correct the problem.[21] The NMFS correctly recognized that the proposal would have a significant economic impact upon a substantial number of small entities. The NMFS then performed an initial regulatory flexibility analysis in which it examined two options—the one it developed and one in which no regulatory action is taken.

In comments to the NMFS, the Office of Advocacy strongly criticized the analysis. First, the Office noted that restricting the analysis to two options is a constricted reading of the RFA. The RFA does not start from the premise of whether regulation is needed.[22] Rather, the RFA requires agencies to consider the type of regulation imposed and whether it is the most cost-effective means of achieving the objectives of the agency.[23] The Office of Advocacy then noted that the NMFS cannot find the most cost-effective means of reducing overfishing if it limits its analysis to two options—one of which was prohibited by court action.[24] Because the NMFS admits that all businesses in the fishery are small, an initial regulatory flexibility analysis would have uncovered a broader range of options, some of which may have been less devastating to small businesses.

One significant alternative that agencies must consider in their regulatory flexibility analyses is exemption from all or part of the

21. Northeast Multispecies Fishery, 58 Fed. Reg. 57,774.

22. Whether a particular regulation is needed is the purview of statutory mandates and Executive Order 12,866.

23. An examination to find the most cost-effective regulation also is required by Executive Order 12,866. In contradistinction, Executive Order 12,291 (now repealed) simply required agencies to determine whether the benefits of the regulatory proposal outweighed the costs. Agencies were not required to examine whether the specific proposal was the most efficient means of achieving that objective. That elision from the regulatory review process is curious indeed because prior administrations prided themselves on their emphasis on efficient resource allocation.

24. The "no action" option was not available to NMFS because litigation required it to develop some sort of restrictions on fishing in the North Atlantic.

rule. In an exhaustive study of RFA compliance at the Environmental Protection Agency (EPA) sponsored by the SBA, EPA's use of exemption alternatives was examined.[25] The authors found that the EPA's use of discrete alternatives may have resulted in the omission of useful alternatives. For example, the EPA did not examine a de minimis exemption for individual firms in developing regulations to implement Section 313 of the Superfund Amendments and Reauthorization Act.[26] Such an exemption (which was ultimately adopted after Advocacy intervention) would dramatically reduce burdens on small businesses and local governmental jurisdictions.

These are but two examples. By limiting the number of discrete alternatives that are examined, agencies are bound to omit entire approaches to reducing regulatory burdens. More significantly, the failure to examine these options may make agencies' rulemakings more susceptible to judicial challenge.[27] Full compliance with the RFA will ensure that a court does not remand a regulation on the grounds that the agency failed to consider obvious alternatives.[28]

25. Henry Beale, Robert Burt, and Kathleen Shaver, *Cost-Effective Regulation by EPA and Small Business Impacts*, prepared by Microeconomic Applications, Inc., for the U.S. Small Business Administration, Office of Advocacy, report no. PB93-115152 (Springfield, Va.: National Technical Information Service, 1992). The study focused on EPA because it remains one of the few agencies that extensively use the analytical tools of the RFA as an integral component of its rulemaking process.

26. Section 313 requires businesses to report release of toxic chemicals to local emergency planning authorities.

27. It is a basic principle of administrative law that agencies must consider all relevant factors in their decision-making process. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Although agencies need not respond to every issue raised by commenters, courts clearly demand that agencies respond to significant alternatives and explain why they did not select a particular alternative. Lloyd Noland Hosp. v. Heckler, 762 F.2d 1561, 1567 (11th Cir. 1985); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

28. United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 253 (2d Cir. 1977). In that case, the Food and Drug Administration brought an enforcement action against Nova Scotia Food Products for violating a seafood handling requirement. Nova Scotia defended itself on the basis that the regulation was arbitrary and capricious because it imposed a technologically infeasible handling alternative. The court agreed with Nova Scotia that the agency had failed to consider technologically feasible alternatives. Because the rule was declared arbitrary and capricious, the court enjoined the Food and Drug Administration from taking any enforcement action. Thus, failure to comply with rational decision-making requirements of the APA may also lead to an agency's inability to take enforcement action.

III. Correcting the Problems with the RFA

Two avenues exist for correcting the problems with agency implementation of the RFA—legislative and managerial. Given the history of noncompliance by many agencies and the ambiguities in the statute, suggestions have been made to legislate changes to the RFA.

A. Legislation

The primary focus of legislative change has been a call for judicial review of agency decisions concerning the implementation of the RFA. Currently, agency actions with respect to regulatory flexibility analysis are only part of the record upon review—certifications are not reviewable at all. Thus, the likelihood that an agency decision will be overturned due to noncompliance with the RFA is remote.[29] In turn, this provides a great incentive for agencies to do only the minimal amount of work needed to avoid lapsing of regulations.[30]

29. As the court noted in Thompson v. Clark, 741 F.2d 401, 405 (D.C. Cir. 1984), the rule would be set aside:

> . . . not because the regulatory flexibility analysis was defective, but because the mistaken premise reflected in the . . . analysis deprives the rule of its required rational support, and thus causes it to violate not any special obligation of the Regulatory Flexibility Act—but the general legal requirement of reasoned, nonarbitrary decision making . . . .

Whether particular rules will ever meet this standard is questionable indeed. Furthermore, this standard is for regulatory flexibility analyses that are made part of the record, which does not include certifications. Thus, any mistaken premise reflected in a certification cannot be used to deprive the rule of its rationality.

30. Section 608 of the RFA provides that the effectiveness of a final rule will lapse 180 days after publication if the agency has neither certified the rule nor prepared a regulatory flexibility analysis. Thus, agencies have incentive to do the minimal amount of work necessary to avoid this penalty. Because certifications are not part of the record on review, an agency has an enormous incentive to certify rules even if that certification is blatantly incorrect. In essence, the one penalty that Congress thought might effectively induce compliance has had the opposite effect on the agencies by granting them an incentive to perform boilerplate certifications.

Supporters of judicial review contend that potential remands by court for failure to comply with the RFA is the only way to obtain full compliance with the analytical requirements of the act.

Vice President Gore's National Performance Review (NPR) report identified problems with the RFA and recommended that legislation be introduced to permit judicial review of agency implementation decisions pursuant to the RFA. The NPR staff believed that evasion of RFA requirements was antithetical to good government and that failure to comply would inhibit the reengineering of the government.

B. Managerial Changes

Legislative changes are important. Nevertheless, the RFA will not fulfill its objective—inculcating small entity concerns into the rulemaking process—until agencies evince a desire to do so. As the authors of the EPA study noted, agency determination to utilize the analytical tools of the RFA was a key element in compliance.[31] The authors of that report make a series of recommendations concerning management of the agency rulemaking process that will achieve the goals of the RFA.

Regulatory flexibility analysis should be incorporated into the rulemaking process at the earliest stages and should be continued throughout the process.[32] Given the necessity for making a threshold determination of whether to perform an analysis, the Office of Advocacy strongly urges agencies to amass data on small entities while attempting to determine whether a problem exists. This data will provide the groundwork for further analysis of the impact of the rules on small businesses.[33]

Analysis should begin with the articulation of the goals and objectives of the regulation, the statutory requirements, and some description of the possible alternatives.[34] This procedure simply articulates

31. Beale, et al., *Cost-Effective Regulation*, 98.

32. *Id.*

33. An excellent example of this predecisional data collection was the regulatory analysis performed by the Food and Drug Administration for its proposed rules to implement the Nutrition Labeling and Education Act. That analysis can be found at 56 Fed. Reg. 60,856 (Nov. 27, 1991).

34. Beale, et al., *Cost-Effective Regulation*.

a rational decisionmaking process that does not predispose an agency to a particular outcome.[35] Agencies must avoid predisposition by recognizing that many alternatives may achieve their statutory objectives.

Agencies should not amass data only on small entities, but should also determine the differential between large and small entities. This review must include not only the differential impact of alternative solutions to a particular problem but also any differential between large and small entities in the creation of the problem.

Agencies should also clearly identify affected small entities early in the process, seeking out their input throughout the entire regulatory process. While the Office of Advocacy was established in part to provide this type of service for small businesses, the cooperation of all government agencies is necessary to provide the needed input for informal rulemakings undertaken by federal agencies.

Finally, the success or failure of any organizational process begins at the top. Agency heads should be dedicated to rational decision making without predetermined results. Senior level managers should require that they be apprised of agency analyses under the RFA and be ready to question the staff about a particular outcome. This should demonstrate the conviction of their commitment to a rational regulatory process and full implementation, in both letter and spirit, of the RFA.

35. The Office of Advocacy believes that many agencies are predisposed to particular regulatory approaches and that they use notice and comment rulemaking to find support for a predetermined result. Proper use of the RFA would force agencies to reexamine their already determined regulatory proposals. As a result, many agencies are loathe to utilize the analytical requirements of the RFA. Ultimately, this inverts the rational decision-making process embodied in the APA and results in less rational rules.

IV. Agency Experience with the RFA in 1993

The Office of Advocacy participated in 57 rulemaking proceedings in 1993.[36] In some instances, Advocacy's participation included substantive comments about agency proposals. In other instances, the comments simply pointed out the agency's failure to follow proper procedure in complying with the RFA. The following discussion will focus on some of Advocacy's substantive comments not addressed elsewhere in this report.

A. U.S. Department of Labor

One of the first pieces of legislation enacted in 1993 was the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 7 (FMLA). The FMLA provides up to 12 weeks of unpaid job-protected leave in any 12-month period to care for a family member. Responsibility for writing implementation regulations was delegated to the U.S. Department of Labor (DOL). A set of interim regulations was adopted in June 1993, and DOL took comments on final rules to be issued later in the year.

The DOL certified that the FMLA regulations do not have a significant economic impact upon a substantial number of small entities. Although the Office of Advocacy concurred with the DOL's reasoning that most small businesses were exempt from compliance with the FMLA, the Office criticized the DOL's failure to address the hun-

36. The Office of Advocacy has limited resources and cannot take part in every rulemaking that may potentially affect small entities. Therefore, Advocacy must carefully select those rulemakings in which it participates. In some instances, the Office of Advocacy takes action because of longstanding RFA compliance problems at a particular agency. In other cases, the Office of Advocacy recognizes the significance of the rulemaking to small businesses and realizes its involvement in the regulatory process is necessary to carry out the Office's primary mission—representing the views of small businesses before federal agencies.

dreds of thousands of small firms with more than 50 employees that would be covered by the FMLA and the regulations.[37] In addition, the Office of Advocacy noted that the FMLA applies to local governmental jurisdictions of less than 50,000 persons and an unknown substantial number of these entities may have more than 50 employees. Thus, the Office of Advocacy contended that the DOL should not have certified the rule. The Office of Advocacy requested that the DOL perform a regulatory flexibility analysis before issuing final regulations.

In the comments filed with the DOL, the Office of Advocacy noted that several alternatives exist that may reduce the effect on small businesses. For example, the DOL regulations define a "key employee" based on whether that employee's salary was in the top 10 percent of the salaries of the firm. Under the initial DOL regulations, employers did not have to comply with the provisions of the FMLA for that employee. In small entities, however, a "key employee" may not meet the salary requirement. The Office of Advocacy suggested that other criteria be used to determine which employees are key for purposes of compliance with the FMLA. The Office of Advocacy also pointed out that intermittent leave may create undue burdens for small entities and recommended imposition of minimum time leave requirements.

The DOL expected to release final regulations late in 1993. Concerns expressed by the Office of Advocacy and other small business groups, however, caused the DOL to delay issuance of the final regulations until these concerns are appropriately resolved.

B. Federal Communications Commission

1. Cable Television Regulation

One of the last actions taken by the 102d Congress was the enactment of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act).[38] The Cable Act was passed to reduce the

37. The RFA defines a small business by referring to the definition in the Small Business Act, 15 U.S.C. § 632. That act defines a small business as one that is independently owned and operated and not dominant in its field. The SBA has promulgated size standards for a wide variety of enterprises. 13 C.F.R. § 121.601. In many instances, the size standard for small business exceeds the 50 employee cutoff in the FMLA.

38. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended at 47 U.S.C. §§ 521-59).

perceived abuses of customers and competitors by cable operators. Implementation of the Cable Act required extensive rulemaking by the Federal Communications Commission (FCC). In particular, the FCC was required to promulgate rules that govern rates charged by cable operators.

The Office of Advocacy recognized the potential impact that these regulations could have on small cable operators, and organized a series of forums with industry representatives to discuss various regulatory options open to the FCC and ways to mitigate potential adverse consequences.

In comments filed in response to the FCC's notice of proposed rulemaking on rate regulation, the Office of Advocacy requested that the FCC establish rate regulations tailored to cable systems with different characteristics. In its initial report, the FCC rejected that request as too complex, establishing instead benchmark rates using price caps as the basis for rate regulation. The FCC contended that it tried to reduce burdens on small operators and small communities as much as statutorily possible. In addition, the FCC promised that a rulemaking would be initiated to develop an alternative regulatory scheme that might be less burdensome on small business.

Shortly after issuing its first order on rate regulation, the FCC issued another notice of proposed rulemaking. The FCC proposed, as an alternative to benchmarks, cost-of-service regulation for those operators who could financially operate under the benchmarks.

The Office of Advocacy commended the FCC for recognizing that the benchmarks may impose undue burdens on small operators. The Office of Advocacy noted, however, that preparation of cost-of-service filings is expensive and may be beyond the financial wherewithal of many small operators. The Office of Advocacy requested that the FCC find less burdensome alternatives, such as a streamlined cost-of-service regulation scheme, or use average cost schedules as it does for rate regulation of small telephone companies. Finally, the Office of Advocacy recommended that these streamlined cost-of-service regulations be available to any cable operator with a total subscriber base of roughly 30,000 and not restricted to cable systems of fewer than 1,000 subscribers.[39] The Office of Advocacy argued that the FCC is obligated to do this, not because the Cable Act requires it, but because the RFA mandates that the FCC

39. The Cable Act requires the FCC to develop regulations that reduce, to the extent possible, the impact of the regulations on cable systems with fewer than 1,000 subscribers.

examine less burdensome alternatives for small businesses and there are many cable operators that are small but exceed the statutory cutoff of 1,000 subscribers.

At an FCC meeting on February 22, 1994, rate regulations were revisited. The FCC voted to substantially modify their prior rules on rate regulation, provide some relief to cable operators with less than 15,000 subscribers, and issue guidance for filing cost-of-service showings. While not entirely satisfied with the efforts made by the FCC, the Office of Advocacy will continue to work with the FCC to develop a regulatory regime that ensures reasonable rates without unduly burdening small operators.[40]

2. Personal Communication Services

The FCC has also been active in developing rules concerning the advent of personal communication services (PCS).[41] In September 1993, the FCC issued a report and order on the licensing regime that will be utilized for the provision of PCS.[42] The FCC shortly thereafter issued a notice of proposed rulemaking to implement Title VI of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (OBRA). That title of OBRA authorized the FCC to conduct auctions for electromagnetic spectrum to be used in the provision of PCS. Congress also required the FCC to develop rules that ensure small businesses, women- and minority-owned businesses, and rural telephone companies opportunities to obtain spectrum and participate in the provision of PCS.

The Office of Advocacy worked extensively with the FCC and the industry to develop a response to the proposed rule. In extensive

40. Comments filed by the Office of Advocacy noted that complex rate regulatory schemes also will have a significant impact on the vast majority of local governments that regulate some aspects of cable service. The Office of Advocacy's request to reduce burdens on small operators also should assist small local governments in coping with rate regulation.

41. PCS is a more advanced form of cellular telephony. By using more cell sites in closer proximity and digital technology, PCS can reduce the size and power of transmitters needed for mobile communication. Ultimately, PCS will provide a seamless wireless network for voice, video, and data transmission with an estimated revenue of nearly 60 billion dollars.

42. The Office of Advocacy filed extensive comments on this proceeding in 1992, and requested that the FCC provide for maximum participation by small businesses through the establishment of relatively small geographic licensing areas. The Office of Advocacy also recommended that limitations on entry of telephone and cellular companies not be imposed if more than three potential entrants exist in each market. To a substantial extent, the FCC concurred with the recommendations of the Office of Advocacy.

comments filed with the FCC, the Office of Advocacy commended the FCC for using the RFA to examine alternatives that would minimize the impact of auctions on small businesses and provide for maximum participation. The Office of Advocacy noted, however, that some of the FCC's proposals could be modified to further increase potential benefits to small businesses.

The FCC held a meeting on March 7, 1994, to discuss the competitive bidding rulemaking. Unfortunately, many of the issues raised in the proposed rulemaking—as well as the Office of Advocacy's comments—were addressed only on a very general basis. Specific issues related to the auctioning of spectrum for PCS was delayed by the FCC. The FCC delayed consideration of many issues and, of those that were considered, many still will be subject to further modification. The Office of Advocacy expects that the FCC, in finalizing the rules, will give full consideration to a wide variety of alternatives that minimize the adverse impact of competitive bidding on small telecommunication firms.

On June 29, the FCC met to revisit the regulations concerning bidding programs for PCS. Several proposals put forth by the Office of Advocacy were adopted, including a $40 million gross revenue test as the definition of a small business, easing the rules for small businesses to form consortia, and authorizing the establishment of spectrum in which only small and medium-sized enterprises can bid. The Office of Advocacy expects that these changes will significantly assist small businesses in obtaining spectrum for construction of PCS networks.

C. Environmental Protection Agency

The Environmental Protection Agency (EPA) issued a proposed rulemaking to prevent further deterioration of ozone in the stratosphere. The proposed rule would have phased out the use of the chemical methyl bromide. The EPA certified that the proposed rule would not have a significant economic impact upon a substantial number of small entities.

The Office of Advocacy noted that methyl bromide is a primary ingredient in many pesticides and herbicides. Dramatically reducing methyl bromide use could have a deleterious effect on the ability of small farmers to protect their crops resulting in substantial financial losses. The Office of Advocacy requested that the EPA prepare a final regulatory flexibility analysis before the issuance of a final rule.

V. Conclusion

Thirteen years of experience with RFA implementation demonstrates that proper utilization—despite obvious flaws in the act—can reduce unnecessary burdens on small entities, as well as lead to increased rationality in agency rulemakings. Unfortunately, inherent limitations in the RFA and agency unwillingness to voluntarily comply detract from accomplishment of the RFA's primary goal—inculcation of small entity concerns in agency rulemaking proceedings.

The Office of Advocacy is constrained to conclude with the National Performance Review report that the only solution is to subject agency decisions implementing the RFA to judicial scrutiny. In addition, agency heads must demonstrate a clear conviction that the RFA is an important analytical tool in the development of regulations. They must be willing to block regulatory solutions that do not properly take into account burdens on and benefits to small entities. Only with both legislative changes and managerial vigilance will the RFA live up to the expectations of its authors.

Appendix: Regulatory Comments Filed by the Office of Advocacy in 1993

Date	*Agency*	*Comment Subject*
01/04/93	HHS/ACF	Final rule published Dec. 14, 1992, entitled "Head Start Program" (57 Fed. Reg. 57,260).
01/04/93	HHS/PHS	Final rule published Dec. 23, 1992, to "Amend Its Center Grant Regulation and to Incorporate Program Changes in the PHS Act Section" (57 Fed Reg. 61,005).
01/04/93	HHS/HCFA	Final rule published Dec. 11, 1992, entitled "Medicare Program: Technical Corrections to Hospital Insurance Eligibility and Entitlement Regulations" (57 Fed. Reg. 58,716).
01/04/93	HHS/HCFA	Proposed rule published Dec. 4, 1992, entitled "Medicaid Program: Computer Matching and Privacy Protection for Medicaid Eligibility" (57 Fed. Reg. 57,403).
01/04/93	HHS/HCFA	Interim final rule published Nov. 2, 1992, entitled "Medicaid Program: Drug Use Review Program and Electronic Claims Management System for Outpatient Drug Claims" (57 Fed. Reg. 49,397).
01/04/93	EPA	Proposed rule published Nov. 5, 1992, entitled "Standards for Emissions From Natural Gas-Fueled, and Liquefied Petroleum Gas-Fueled Motor Vehicles and Motor Vehicle Engines, and Certification Procedures for Aftermarket Conversion Hardware" (57 Fed. Reg. 52,912).
01/04/93	USDA/FNS	Final rule published in the *Federal Register* Dec. 18, 1992, entitled "Affecting Food Stamp Employment and Training Requirements."

Appendix: Regulatory Comments Filed by the Office of Advocacy in 1993

Date	*Agency*	*Comment Subject*
01/11/93	FCC	Proposed rule published in the *Federal Register* on Dec. 23, 1992, entitled "Implementation of the Cable Television Consumer Protection and Competition Act of 1992."
01/11/93	DOT/RSPA	Proposed rule published Dec. 22, 1992, entitled "International Maritime Dangerous Goods Code and ICAO Technical Instructions; Matter Incorporated by Reference" (57 Fed. Reg. 60,738).
01/13/93	FCC	Proposed rule published Oct. 28, 1992, on "Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies" (57 Fed. Reg. 48,776).
01/22/93	HHS/FDA	Final rule published Dec. 7, 1992, entitled "Orange Juice Products: Amendment of Standards of Identity" (57 Fed. Reg. 57,666).
01/22/93	DOT	Proposed rule published Nov. 17, 1992, entitled "Concerning Transportation for Individuals with Disabilities" (57 Fed. Reg. 54,210).
01/22/93	DOT/NHTSA	Proposed rule published Dec. 14, 1992, entitled "Federal Motor Vehicle Safety Standards: Occupant Crash Protection" (57 Fed. Reg. 59,043).
01/27/93	DOT/RSPA	Proposed rule published Nov. 20, 1992, entitled "Passage of Instrumented Internal Inspection Devices" (57 Fed. Reg. 54,745).
02/26/93	HHS/ACF	Final rule published Jan. 21, 1993, entitled "Head Start Program" (57 Fed. Reg. 5,492).
02/23/93	FCC	Proposed rule published on "Implementation of the Cable Television Consumer Protection and Competition Act of 1992" (58 Fed. Reg. 48).

02/23/93	HHS/FDA	Final rule published Jan. 5, 1993, on "Quality Standards for Foods With No Identity Standards: Bottled Water" (58 Fed. Reg. 378).
02/23/93	ICC	Proposed rulemaking published Jan. 25, 1993, entitled "Single State Insurance Registration" (58 Fed. Reg. 5,951).
02/19/93	IRS	Final regulation published Dec. 29, 1992, entitled "Definition of Affiliated Group" (57 Fed. Reg. 61,797).
03/01/93	HHS/FDA	Proposed rules published in the *Federal Register* re: (1) Jan. 5, 1993, "Beverages: Bottled Water" (58 Fed. Reg. 393); and (2) Jan. 6, 1993, "Frozen Desserts: Removal of Standards of Identity for Ice Milk and Goat's Milk Ice Milk; Amendment of Standards of Identity of Ice Cream and Frozen Custard and Goat's Milk Ice Cream" (58 Fed. Reg. 520).
03/12/93	DOT/CG	Proposed rule published Jan. 12, 1993, entitled "Overfill Devices" (58 Fed. Reg. 4040).
03/15/93	IRS	Notice of proposed rule published Jan. 12, 1993, entitled "Non-discrimination Requirements for Qualified Plans" (58 Fed. Reg. 3876).
03/19/93	DOI/FWS	Proposed rules published in the *Federal Register*: (1) March 1, 1993, "Endangered and Threatened Wildlife and Plants: Proposed Rule to List Rio Grande Silvery Minnow as Endangered Species, With Critical Habitat" (58 Fed. Reg. 11,821); and (2) Jan. 29, 1993, entitled "Endangered and Threatened Wildlife and Plants; Proposed Determination of Critical Habitat for the Colorado River Endangered Fishes; Razorback Sucker, Colorado Squawfish, Humpback Chub, and Bonytail Chub" (58 Fed. Reg. 6578).
29/93	FCC	Notice of proposed rulemaking issued by the FCC on Feb. 19, 1993 to "Address Tariff Filing Requirements for all Carriers Other than AT&T and Local Exchange Carriers" (58 Fed. Reg. 17,813).

Appendix: Regulatory Comments Filed by the Office of Advocacy in 1993

Date	*Agency*	*Comment Subject*
04/14/93	EPA	Notice of proposed rulemaking published in the *Federal Register* on Feb. 12, 1993, entitled "Exemption of Petroleum-Contaminated Media and Debris From Underground Storage Tanks From RCRA Hazardous Waste Requirements" (58 Fed. Reg. 8504).
04/14/93	EPA	Notice of proposed rulemaking published Feb. 11, 1993, entitled "Hazardous Waste Management System; Modification of Hazardous Waste Recycling Regulatory Program" (58 Fed. Reg. 8102).
04/15/93	DOJ	Proposed ruled published April 5, 1993, concerning "Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities" (58 Fed. Reg. 17,558).
04/19/93	EPA	Proposed rulemaking published Dec. 31, 1992, entitled "National Emission Standards for Hazardous Air Pollutants for Source Categories; Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry and Seven Other Processes" (57 Fed. Reg. 62,608).
05/14/93	FCC	Proposed rule rublished April 30, 1993, to "Modify the Filing of Tariffs to Conform with the Metric Conversion Act" (CC Docket No. 93-55), (58 Fed. Reg. 26,087).
05/20/93	EPA	Proposed rulemaking published March 18, 1993, entitled "Protection of Stratospheric Ozone" (58 Fed. Reg. 15,014).
06/01/93	USDA/FS	Request review of "National Forest Plans and Projects Decisions," published April 14, 1993 (58 Fed. Reg.).

06/10/93	USDA/AMS	Proposed and final rules published in the *Federal Register* re: (1) proposed rule, May 27, 1993, Sweet Cherries Grown in Designated Counties in Washington (Order No. 932); (2) proposed rule, Dec. 29, 1992, South Texas Onions (Order no. 959); (3) proposed rule, Jan. 15, 1993, South Texas Melons (Order no. 979); (4) final rule, May 17, 1993, Filberts and Hazelnuts Grown in Oregon and Washington (Order no. 982); (5) proposed rule, Feb. 18, 1993, Grapes Grown in Designated Areas of Southeastern California (Order no. 925); (6) final rule, May 13, 1993, Spearmint Oil Produced in the Far West (Order no. 985); (7) Final Rule, May 13, 1993, Kiwifruit Grown in California (Order no. 920); (8) proposed rule, Feb. 16, 1993, Irish Potatoes Grown in Colorado (Order no. 948); (9) final rule, Feb. 16, 1993, Winter Pears Grown in Oregon, Washington, and California (Order no. 927); (10) proposed rule, Feb. 16, 1993, Olives Grown in California (Order no. 932); (11) proposed rule, Feb. 16, 1993, Limes and Avocados Grown in Florida (Order nos. 911 and 915); (12) final rule, Jan. 8, 1993, Mushroom Promotion, Research and Consumer Information Order (Order no. 1209); (13) final rule, Dec. 30, 1992, Vidalia Onions Grown in Georgia (Order no. 955); (14) final rule, Dec. 30, 1992, Dates Produced and Packed in Riverside County, California (Order no. 987); (15) final rule, Dec. 30, 1993, Pears Grown in California (Order no. 917)
06/28/93	ED	Proposed rule published in the *Federal Register* on May 27, 1993, concerning existing regulations that govern the "State-Administered Workplace Literacy Program and the National Workplace Literacy Program" (58 Fed. Reg. 30,919).
07/23/93	USDA	Proposed rule published May 25, 1993 on the "National Commodity Processing Program" (58 Fed. Reg. 60).
07/26/93	USDA	Petition on "Storm Water Industrial Facilities—Phase 1—Elimination of Certain Provisions Addressing Facilities Reporting Under Section 313 of the Superfund Amendments and Reauthorization Act of 1986 (SARA)."

Appendix: Regulatory Comments Filed by the Office of Advocacy in 1993

Date	*Agency*	*Comment Subject*
08/25/93	FCC	Proposed rule published July 30, 1993, concerning "Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992" (MM Docket no. 93-215), (58 Fed. Reg. 40,762).
08/31/93	DOL/WHD	Proposed rule published June 3, 1993, entitled "Implementing the Family and Medical Leave Act of 1993" (58 Fed. Reg. 31,794).
09/16/93	USDA/FSIS	Proposed rule published Aug. 16, 1993, entitled "Mandatory Safe Handling Statement on Labeling of Raw Meat and Poultry Products," (Docket no. 93-0121), (58 Fed. Reg. 43,478).
09/27/93	USDA/FNS	Final rule published Aug. 10, 1993, entitled "Meal Supplements in the National School Lunch Program" (58 Fed. Reg. 42,483).
10/08/93	NRC	Proposed rule published June 17, 1993, concerning "Preparation, Transfer for Commercial Distribution, and Use of Byproduct Material for Medical Use" (58 Fed. Reg. 33,396).
10/15/93	FCC	Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board (CC Docket No. 80-286).
11/4/93	DOT/RSPA	Proposed rule published July 9, 1993, entitled "Hazardous Materials in Intrastate Commerce" (58 Fed. Reg. 36,920).
11/10/93	FCC	Proposed rule published Nov. 10, 1993, on "Implementation of Section 309(j) of the Communications Act—Competitive Bidding" (58 Fed. Reg. 53,489).
11/15/93	FCC	Proposed rule published Nov. 15, 1993, on "Review of the Pioneer's Preference Rules" (58 Fed. Reg. 57578).

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STATEMENT BY

CHARLES N. GRIFFITHS, JR.

OF THE

NATIONAL ROOFING CONTRACTORS ASSOCIATION (NRCA)

BEFORE THE

COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

CONCERNING THE

STRENGTHENING OF THE REGULATORY FLEXIBILITY ACT OF 1980

JANUARY 23, 1995

Chairman Meyers and Members of the Committee, my name is Charles N. Griffiths, Jr. and I am the owner of Binghamton Slag Roofing Company in Binghamton, New York. I am the fourth generation in a family business founded in 1913. We install both large commercial roofs and smaller residential roofs and employ nearly 80 people. I am testifying today on behalf of the National Roofing Contractors Association (NRCA). I am also here representing the Associated Specialty Contractors (ASC)*, a federation of eight national contractor associations with a combined membership of 26,000 contracting firms.

NRCA is an association of roofing, roof deck and waterproofing contractors. Founded in 1886, it is one of the oldest associations in the construction industry and has over 3,600 members represented in all 50 states. Every one of those members is a small, privately held company; our average member, in fact, employs 35 people and has annual sales of just over $3 million per year.

I appreciate the opportunity to comment on strengthening the Regulatory Flexibility Act of 1980. NRCA applauds the Committee's decision to hold hearings on this timely issue. Requiring agencies to consistently apply cost benefit analysis to newly promulgated regulations is one of the first steps in removing the strangle hold that overregulation has on economic growth in this country.

LEGISLATIVE OVERVIEW

As you know, the Regulatory Flexibility Act of 1980 (RFA), or "Reg Flex," as it is generally called, was passed to make federal agencies consider the cost impact their regulations would have on small business before they go into effect and to minimize that impact wherever possible.

When a federal agency proposes a regulation, under the law it must publish an analysis of the regulation's economic impact on small business and solicit public input. However, there was no enforcement mechanism included in the 1980 law. As passed, judicial enforcement of the law was specifically prohibited. As a result, agencies can and do disregard its provisions with impunity.

If an agency head simply certifies that a regulation will have no significant impact on small business, the agency may ignore the provisions of Reg Flex. Agencies have used this loophole to avoid the intent of the RFA.

To illustrate my point, let's take a look at the Occupational Safety and Health Administration's (OSHA) April 19, 1994 *Federal Register* notice inviting written comments on proposed regulations (Sec. 1903.19) concerning Abatement Verification. Despite an imposing regimen of new paperwork and reporting requirements from OSHA regarding hazard abatement verification with the agency, OSHA states: "Pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.), the Agency preliminarily certifies that the proposed regulation would

not have a significant impact on small businesses in any industry." (*Federal Register*, Vol. 59, No. 75, p. 18515)

This is clearly not the case for the construction industry, and roofing in particular. NRCA's written comments to OSHA dated July 18, 1994, state that roofing work is, in general, of short duration, typically lasting 14 or fewer days. OSHA citations typically arrive an average of 30 days after the inspection has occurred, or a full 16 days after the project has already been completed. To require a contractor to sufficiently document all of the work practices used during performance of roofing work, or worse, to require a contractor to reconstruct evidence of abatement (especially photographic when the work has been completed) for the sole purpose of compliance verification is costly and counterproductive. Such a burden is particularly onerous for small businesses with limited personnel and resources, such as roofing contractors.

Additionally, OSHA's analysis of compliance time and costs is grossly underestimated given the impossibility of post-project verification. OSHA estimates the average time required to sufficiently document abatement, generate an abatement certificate, and submit and post it to be 15 minutes. OSHA says, "Other costs, such as for photocopying, photography, or other documenting activity {including videotape with identification for the citation referenced}, are believed to be minimal." Clearly, such a cost analysis is not based on reasonable estimation techniques because it is physically impossible to even assemble the necessary items in a 15 minute period.

In fact, it is very difficult to read and comprehend the OSHA Abatement Verification Notice of Proposed Rulemaking in less than 60 minutes. Regardless, it is almost certain that OSHA's preliminary certification (that the proposed abatement verification regulation would not have a significant impact in any industry) will not be changed when the regulation is finalized. In other words, because Reg Flex has no teeth, agencies rarely pay attention to comments in this context.

The RFA also requires a review of regulations ten years after they have been put in place to ensure that no significant cost impact on small business has occurred. Again, there is no enforcement mechanism, which is one reason NRCA supports the Regulatory Transition Act of 1995, H.R. 450, which will place a moratorium until June 30, 1995 on federal regulations that have been issued or proposed since November 9, 1994.

OSHA'S NEW ASBESTOS STANDARD

Another example of OSHA's disregard for the cost impact of new regulations is the new asbestos standard, which went into effect on October 11, 1994. Asbestos Containing Roofing Materials (ACRM) are present, normally in very small amounts, in an estimated 90 percent of all homes and 58 percent of all buildings in the U.S. today. In the overwhelming majority of these cases, ACRM is present in roof coatings, cements, mastics and base flashings where the asbestos fibers are fully encapsulated in a bituminous or resinous binder.

Despite the Environmental Protection Agency (EPA) and the Consumer Protection Agency's conclusion that there is no likelihood of fiber release from these materials as they are handled in roofing work, OSHA is imposing this onerous standard on all ACRM removals. NRCA estimates that compliance with OSHA's new rules will almost double both the cost and the duration of roofing jobs subject to the standard.

In 1991, OSHA issued a Notice of Proposed Rulemaking for this new standard. OSHA hired CONSAD, a favorite consulting firm of the agency, to conduct its economic impact analysis. CONSAD concluded that the annual incremental cost per affected firm would be $324, and the annual incremental cost per affected worker would be $135.

NRCA conducted its own review, based on the CONSAD report, which demonstrates that OSHA has substantially underestimated the total per worker and per firm costs of its new standard. If some, but not all, of OSHA's errors are corrected, the impact on the projected bottom line for roofing would still be huge--annual compliance costs will be approximately $1.3 billion! OSHA's per worker and per firm costs of $135 and $324 are also grossly underestimated. NRCA estimates that the average annual cost would be approximately $7,759 per worker and $47,515 per firm. This increase in per firm costs could easily erase the profit margin of small- and medium-size roofing firms.

Why is there such an incredible discrepancy between OSHA's figures and NRCA's estimates? In short, OSHA's Regulatory Impact Analysis reflects major omissions. For example, OSHA

cost figures only take into consideration Built-up Roofing (BUR) removal. By covering only BUR removals and repairs, OSHA has failed to cover the vast majority of roof removal and repair jobs. NRCA estimates that removals of asbestos-containing BUR constitute less than 12 percent of all roof removal jobs.

Mrs. Meyers, I cannot emphasize enough the drastic impact this standard will have on my business and the roofing industry in general. The industry is made up predominantly of thinly-capitalized small businesses that lack the resources and expertise to cope with OSHA's complicated standard. Consequently, thousands of roofing workers may lose their jobs. Those roofing workers fortunate enough to keep their jobs or find new ones will quickly face increased safety and health hazards as a result of OSHA's respirator and protective clothing requirements.

NRCA asked for judicial review of the standard, and our message to OSHA is simple: roofing workers can be fully protected against significant health risks in ACRM work by a regulation, like EPA's, which (1) tightly focuses on only those relatively few jobs where significant fiber release is even possible, and (2) imposes common-sense work practice controls that are within the capabilities of typical roofing contractors. Requiring OSHA to comply with the RFA would go a long way to preventing arbitrary and burdensome regulations, such as the asbestos standard, from adversely impacting roofing companies and other small businesses.

CONCLUSION

OSHA's regulations are so difficult to understand that another government agency, the Small Business Administration (SBA), has spent the taxpayers' money on an OSHA Handbook for Small Business, a publication that offers information on how to comply with federal occupational safety and health laws. Attached is the advertisement from the SBA publication, The Small Business Advocate, which asks the reader, "Puzzled by OSHA Regulations?" It is clear that even the federal government recognizes that OSHA's regulations are too complicated and that, as a result, small business people are facing exasperating compliance problems.

The Regulatory Flexibility Act was intended, as I understand it, to prevent such excesses. Unfortunately, small businesses have little recourse when agencies arrive at absurd economic impact conclusions, or proceed with rules even after concluding that there are marginal benefits.

Agencies are deliberately disregarding the letter and the intent of the law because it has no teeth. That is why strengthening the Regulatory Flexibility Act would be so helpful to me and other small business owners.

NRCA strongly supports provisions outlined in Title VI of the Job Creation and Wage Enhancement Act of 1995, H.R. 9, which strengthens the RFA and would clarify procedures for judicial review of agency compliance.

I appreciate having the opportunity to be here today and will be happy to answer your questions.

* Members of the Associated Specialty Contractors: Mason Contractors Association of America; Mechanical Contractors Association of America; National Association of Plumbing-Heating-Cooling Contractors; National Electrical Contractors Association; National Insulation and Abatement Contractors Association; National Roofing Contractors Association; Painting and Decorating Contractors of America; Sheet Metal and Air Conditioning Contractors National Association.

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TESTIMONY OF

MR. ROBERT POOL

FOR
THE NATIONAL ASSOCIATION FOR THE SELF-EMPLOYED

BEFORE THE

COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

ON THE

REGULATORY FLEXIBILITY PROVISIONS OF H.R. 9,
THE JOB CREATION AND WAGE ENHANCEMENT ACT

JANUARY 23, 1994

Madam Chair Jan Meyers, Ranking Member John LaFalce, and House Small Business Committee Members, thank you for inviting me to testify today. My name is Robert Pool, and I am Past President and a member of the Board of Directors for Homestyle Publishing. The company employs about 50 full-time persons and publishes a catalog (for sale on newsstands) providing interested persons with blueprints to construct new homes.

I am testifying today for the National Association for the Self-Employed, and I am here in my capacity as a member of the association's Board of Directors. The NASE represents over 300,000 small business persons throughout the United States. Over 85 percent of the NASE members are business owners with 5 or fewer employees. The membership is involved with a very wide range of businesses, notably in the consulting and retail fields.

On behalf of the NASE, I am pleased to address the Regulatory Flexibility Act of 1980. The NASE is one of the founding groups of the Regulatory Flexibility Act Coalition, a broad coalition of 57 small business and small governmental associations. Altogether, the Coalition represents more than 5 million small businesses and over 13,000 small local governments.

H.R. 9, the Job Creation and Wage Enhancement Act of 1995

In my capacity as a small businessman and member of the NASE Board, I am very familiar with the harmful impact that burdensome regulations can have on the ability of a business to grow and thrive in today's economy. For this reason, we commend the Small Business Committee for holding this hearing on the Regulatory Flexibility reform provisions of H.R. 9, the Job Creation and Wage Enhancement Act of 1995. These provisions are identical to H.R. 830, the bill introduced last Congress by Representative Tom Ewing and cosponsored by Representatives Jan Meyers, John LaFalce and others which would strengthen the Regulatory Flexibility Act in a number of ways. H.R. 830 ultimately garnered about 250 House cosponsors. Sixty-seven Senators voted in favor of an RFA amendment in 1994 as part of S. 4, the Senate version of the National Competitiveness Act. Also, 380 House members voted last year to support a nonbinding resolution calling for approval of the RFA provisions of S. 4 -- a resolution authored by Representative Robert Walker.

We want to thank Madam Chair Jan Meyers and other members of the House Small Business Committee for being original cosponsors of H.R. 9. Among other reform measures, this bill provides for judicial review of the Regulatory Flexibility Act. We are also pleased to see that the Clinton Administration lent its support last year to strengthening the RFA, as well as in two separate recommendations by Vice President Gore's Reinventing Government Task Force.

This support is a welcome reminder of the backing the Regulatory Flexibility Act has long enjoyed. Introduced in the Senate in 1977 by Senators John Culver (D-IA) and Gaylord Nelson (D-WI), the RFA was unanimously reported and passed by the Senate late in 1978. In 1979, the bill was introduced and championed in this Committee by Rep. Bob Kastemmeier (D-WI). It enjoyed wide bipartisan backing in both chambers. It was a top

recommendation of President Carter's White House Conference on Small Business in January, 1980 and was passed overwhelmingly by Congress and signed into law by President Carter later that year.

The Regulatory Flexibility Act has enjoyed strong support because it is a responsible approach to a very real problem. Every member of Congress has heard the vigorously expressed concerns of small business and small government constituents regarding federal regulations and paperwork. Federal agencies that comply with the RFA properly can go a long way toward addressing that public concern -- yet can do so without compromising their missions or their legal obligations. For members of Congress, the Act can provide a channel for turning constituent complaints about "the bureaucracy" into constructive solutions.

But to accomplish this, the RFA must be a law Congress and constituents can depend on. Unfortunately, that has become less true over time. Change is needed.

How the Regulatory Flexibility Act Is Designed to Work

The Regulatory Flexibility Act is designed to address a very significant problem. The drafters of regulations normally find it simpler to promulgate "one-size-fits-all" regulations, as opposed to taking the time to analyze whether different rules should apply to different segments of the population. Of course, regulating everyone in exactly the same way is sometimes the right thing to do. Rules of general applicability are sometimes necessary to protect public health and safety, for example. But because regulators find such uniform rules more administratively convenient, they may be inappropriately used. In many instances such inflexible rules can violate common sense, simple fairness and economic efficiency. The Regulatory Flexibility Act addresses a particularly troubling aspect of "one-size-fits all" rulemaking -- the misapplication of uniform rules to small businesses, small non-profit organizations and smaller jurisdictions of government. The RFA tells rule writers to think about the effects of their actions on these "small entities". Whenever possible and consistent with their underlying legislative mandates, the rulemakers should seek alternatives that are less burdensome for these small entities.

The most obvious reason why doing this is sound public policy is that these "smaller entities' may not be the sources of the problems the agencies are trying to address in the first place. For example, using RFA analyses, the Environmental Protection Agency has been able to identify small businesses which do not create health or environmental problems, and exempt those businesses from the requirements imposed on other, larger businesses which do create health and environmental problems. Scores of EPA regulations have been structured in this way.

A second reason why agencies should weigh their regulatory impacts on small entities is that small entities typically lack the resources and in-house expertise to do so themselves. Indeed, small entities very often are unaware of pending regulations. Even when small entities do comment on proposed rules, they tend to do so without help from the kind of attorneys, accountants, economists, and compliance specialists that larger entities can afford.

The key economic problem is the disproportionate costs involved. Rules which impose the same costs on everyone work a special hardship on small entities because small entities must spread those costs over fewer employees, fewer units of production, fewer taxpayers and smaller revenues. Thus, rules imposing identical expenditures on large and small entities tend to raise costs more for the small. One Small Business Administration study suggests that, on average, small businesses pay three times more per employee than big businesses to comply with the same regulations.

The RFA also helps because the public interest is enhanced whenever agencies write sound regulations that are the result of reasoned analysis and an open process of public notice and comment. Both regulatory reasoning and public input can be improved by using the RFA. This improved information, in turn, can help agencies use their limited resources more efficiently by designing regulations that can be complied with and that devote the most attention and resources to the most serious problems.

To help achieve its purpose, the Act empowers the SBA Office of Advocacy to receive proposed and final regulations, to comment on rules, to seek enforcement of the RFA within the federal government, and to file *amicus curiae* briefs in judicial proceedings involving rules impacting small business.

What the Regulatory Flexibility Act Does Not Do

It is important to note what the RFA does *not* do. It does not specify what rules an agency may or may not write. It does not override an agency's substantive legal responsibilities. Above all, it does not tell an agency what its rules should say. Section 606 of the RFA explicitly states that the RFA's analysis requirements "... do not alter in any manner standards otherwise applicable by law to any agency action." As with the rest of the Administrative Procedure Act, of which it is a chapter, the RFA specifies procedures which must be followed -- nothing more, nothing less.

The Need to Revise the RFA

Unlike the rest of the Administrative Procedure Act, and indeed, unlike virtually every other statute agencies must observe, the RFA severely restricts judicial review. Section 611(b) states that the Regulatory Flexibility analyses prepared under the Act shall not be subject to judicial review -- but then goes on to say that these analyses do constitute part of the agency's rulemaking record, which a court may examine. This murky reasoning has led to judicial confusion in interpreting the statute. This in turn has meant that the many agencies sincerely attempting to comply with the RFA have had little judicial guidance in interpreting the statute. Worse, it has led to an apparent belief on the part of some agencies that compliance with the RFA is entirely voluntary.

The most frequently encountered agency violations of the RFA -- the kind one finds in any copy of the *Federal Register* -- are these:

- proposed or final rules which omit any mention of the RFA;

- rules which assert a lack of impact on small entities, but offer no reason for this assertion;
- agency claims of broad exemptions from the RFA; and
- rules which acknowledge an impact on small entities, without any accompanying efforts to lessen that impact or explain why doing so would not be feasible.

Other testimony presented to the Committee today may document a large number specific agency compliance problems, ranging from unjustified waivers under Section 605(b) of the Act to the blanket exemption claimed by the Internal Revenue Service. Perhaps two items will provide some context, however.

Item 1. "Section 89"

In 1988, the Internal Revenue Service proposed new regulations under Section 89 of the Internal Revenue Code. These regulations would have dealt with tests and data collection required of businesses to prove nondiscrimination in employee benefit plans. In the opinion of many in the small business community, as well as SBA's Office of Advocacy and a number of members of Congress, the objectives of Section 89 could have been met with far fewer paperwork and compliance burdens on small business than the IRS was proposing. However, the IRS maintains that virtually all of its rules are "interpretative" and therefore completely exempt from the RFA. So substantive comments and recommendations made by members of Congress, the small business community and the Office of Advocacy to the IRS for reducing the small business burden of the Section 89 regulations were ignored. Yet a judicial challenge under the RFA was not possible. The IRS' decision to press forward with the regulations as proposed led to the rapid emergence of a national grassroots movement to strike down Section 89. Congress was forced to intervene, and the issue mushroomed into a bitter election-year battle involving six Congressional committees, thousands of constituent visits and millions of pieces of mail. In the end, Section 89 was repealed altogether. It is not too much to say that if the IRS has conscientiously applied the RFA, or if the threat of judicial review of the RFA had been available, the entire episode could have been avoided.

Item 2. The Review of Existing Regulations

Section 610 of the RFA requires every agency to review its existing rules over a ten-year period, beginning with the effective date of the Act, and to delete or simplify those rules which impose unnecessary burdens on small entities. The deadline for this occurred on January 1, 1991 -- that is, 4 years ago. To date, not one agency has fully complied with this legal requirement. Not one. Not even the SBA. Most agencies have not put a single regulation through this ten-year review.

As these items, and the other evidence before the Committee should suggest, a major problem exists with RFA compliance. The normal mechanism for forcing compliance with a law is the threat, or reality, of a lawsuit. This has not been possible with the RFA. The existing judicial review formulation in the Act, Section 611(b), simply has not worked. The courts are confused about what it means, individual agencies feel free to excuse themselves from the law at will, and every single agency of the federal government has ignored a major

provision of the statute over the last fourteen years.

Judicial Review of the RFA

Judicial review of the RFA is not an end in itself, but rather a means to an end -- strengthening agency compliance with the law. Small businesses do not typically have the resources to sue federal agencies; they are unlikely to do so except in extraordinary cases. But the threat of judicial review, even if remote, could vastly improve the seriousness with which the RFA is treated by the agencies and therefore the effectiveness of the law in solving the national problem to which it is addressed. Perhaps there is another way, besides judicial review, to permanently and effectively deter agency non-compliance. If so, the small business community would be happy to consider it. But so far we have not heard of such an alternative. And it is surely striking that virtually every other law governing agency administrative procedures deters non-compliance through the threat of judicial review.

Having stated this, it is important to note that unlimited judicial review is not the NASE's goal. We do not seek interlocutory review, as was granted in agency rulemakings under the National Environmental Policy Act (NEPA). We are more than willing to work with Congress in shaping careful legislative language on judicial review, to prevent the RFA from being abused. But any proposal for revision of the RFA which leaves intact the current gridlock on judicial review will not be acceptable to the NASE. Congress must not condone continued agency flaunting of this Act.

It is possible that an initial flurry of lawsuits could be filed under the RFA after judicial review is permitted. If so, it would likely be a short-lived phenomena. Once the courts render their first round of decisions regarding acceptable and unacceptable agency conduct, and once those boundaries are well understood by the administrative law bar, such cases would probably diminish sharply. Both agency general counsels and plaintiffs attorneys would understand how much discretion the courts would be willing to allow the agencies. And both could be expected to respect those boundaries. There are, of course, sanctions which the courts employ against the flag of frivolous lawsuits.

Judicial review of RFA is not likely to lead to excessive litigation or a "clogging of the courts." Small businesses and governments simply do not have the time and resources to sue federal agencies over anything less than egregious violations. Attorneys want to avoid risking the reprimands or fines resulting from filing trivial federal lawsuits, and the federal courts themselves are not willing to waste their own time on inconsequential matters.

Another potential check on judicial review which the Committee might wish to explore is authorizing the Office of Advocacy to assist other agencies in drafting their procedures for RFA compliance. (This could be similar to the role EPA performs now in assisting other agencies as they draft their environmental compliance procedures.) An agency which then followed Advocacy-approved RFA procedures could use Advocacy's approval as a defense in court.

Indirect Effects of Rules

Another crucial improvement that is necessary to make the RFA function properly, in the NASE's view, is getting agencies to assess indirect as well as direct consequences of rules. It is not simply the effect of individual rules in isolation which burden small entities, but the cumulative effect of all rules. Agencies need to be far more sensitive to the reporting and compliance requirements already imposed on small entities as they consider new requirements. Agencies also need to understand that a rule which threatens the viability of a small business' suppliers or customers, or a small government's tax base, also threatens that small business or small government. To be more aware of these indirect effects, agencies should develop their own in-house pictures of the populations they regulate and should work closely with the SBA Office of Advocacy, to make use of its data bases. H.R. 9 also addresses this problem.

Advance Notification of Rulemakings

The requirement, under Section 602 of the RFA, for agencies to provide Advocacy with regulatory agendas, so as to allow Advocacy to anticipate rulemakings, has not worked properly. The agendas have not been produced in a timely manner, and the descriptions of planned rulemakings often have been vague or inaccurate. This problem is not entirely the fault of the agencies. Six-month advance agendas by their nature are often tentative. Priorities change, legislation changes, sudden needs arise. One approach to remedying this problem -- that taken by H.R. 9 -- is to require agencies to provide Advocacy with advanced notification of *specific* rulemakings. This problem, too, deserves Congress attention if the RFA is to be fully effective..

Amicus Rights of the Office of Advocacy

The filing of amicus curiae briefs by the Office of Advocacy in selected legal cases is necessary, not only to give "moral" assistance to beleaguered individual small businesses, but to alert the courts to cases where key questions of principle are at issue. That is why Congress took the extraordinary step, in Section 612(c) of the Act, of *directing* the Courts to accept such an intervention by the Office of Advocacy. Yet no such *amicus* brief has ever been filed by the Office of Advocacy. H.R. 9 seeks to remedy this by reasserting Congress' intent in this matter. Whether through this "sense of the Congress" approach or some other, it is imperative that Advocacy understand and carry out its full responsibilities under the RFA.

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Statement of

Lee Taddonio
TEC/Pennsylvania Small Business United

Before the
House Small Business Committee

Regarding
The Regulatory Flexibility Act

On Behalf of
National Small Business United

January 23, 1995

Madame Chairman and Members of the Committee:

Good Morning. My name is Lee Taddonio, with TEC/Pennsylvania Small Business United, based in Pittsburgh, Pennsylvania. I am proud to be representing National Small Business United and TEC/Pennsylvania Small Business United at today's hearing. I would first like to take this opportunity to thank the committee for holding this hearing and for being so helpful in the continuing search for solutions to the wide range of small business problems and concerns.

As you may well know, National Small Business United (NSBU) is the oldest association exclusively serving the small business community of our nation--for over 50 years now. NSBU serves over 60,000 individual companies with members in each of the 50 states, as well as local, state, and regional organizations. NSBU is uniquely qualified to represent the views of the small business person.

I. INTRODUCTION

I am pleased to be here today to testify on the status of the Regulatory Flexibility Act, as well as to comment on the provisions of H.R. 9, the Job Creation and Wage Enhancement Act, which relate to the Regulatory Flexibility Act. This bill would

strengthen the Regulatory Flexibility Act and help small business in a number of very important ways. H.R. 9 would accomplish several important goals, which the small business community has supported for a very long time. Most importantly, it would 1) allow judicial review of agencies' decisions; 2) take into account the indirect effects of regulation on small business; and 3) increase the role and authority of the Small Business Administration's Office of Advocacy in reviewing and improving regulations, and 4) create a role for the Office of Management and Budget (OMB) to oversee proper implementation of the Act. These are all very important steps very helpful to small businesses, and we strongly endorse them.

First, some background. After being a top recommendation of the first White House Conference on Small Business, the Regulatory Flexibility Act (RFA) passed Congress in 1980 as a result of the realization that small businesses and large businesses often function in fundamentally different ways. They are so different, in fact, that regulations which treat them identically can be considered discriminatory toward small businesses. With passage of the Regulatory Flexibility Act, Congress firmly established the principle that small businesses are unique, and that regulators would no longer pass rules and regulations without considering the effect on smaller businesses and considering less burdensome alternatives. Since its original passage, the Act has also become an important model utilized by state governments as well.

II. ENFORCEMENT AND JUDICIAL REVIEW

The Regulatory Flexibility Act requires regulators to consider and account for the costs to small businesses of their actions. Although not without its problems and substantial areas for improvement, these first years of implementation of the Regulatory Flexibility Act (RFA) have proven its value--and even greater potential--to the small business community. As I shall attempt to point out, however, areas of concern remain, particularly with respect to enforcement of the Act.

The RFA requires every agency to perform an Initial Regulatory Flexibility Analysis (IRFA) for each regulation deemed to have a significant impact on small business. These IRFAs must first contain estimates both of how many small businesses would be affected and descriptions of their regulatory requirements, including special skills which might be necessary to fulfill those requirements. The IRFAs must then also discuss alternatives and their feasibility.

The obvious flaws in this process, which have led to problems in the past, are that it is the agency's responsibility to decide whether the rule has a significant impact on small business (good or bad) and to perform the IRFA to determine the extent of that impact. The conclusions of the agencies regarding these matters are not always thoughtful and well documented; hence, the quality utilization and recognition of the

intent of the RFA is sporadic. The Office of Advocacy within the Small Business Administration (SBA) is charged under the RFA with reviewing regulations for their impact on small business, but regulators are not required to abide by SBA recommendations or submit proposals for early review. Strengthening the hand of the Office of Advocacy is a key component to greater agency observation of the RFA.

Perhaps more importantly, the Act also does not provide for any judicial review and recourse in a situation where regulators have ignored the provisions of the RFA, such as by falsely declaring that a rule would not have a significant impact on small business. H.R. 9 bill would change this scenario by allowing for full judicial review and challenges to agencies' interpretations of the Act. It is true that in the years since its original implementation, observation of the Act has become a more ingrained process for the regulators. But there is also a feeling among many regulators that the Act is an unnecessary nuisance, and many regulators are guilty of looking for creative (and some not-so-creative) ways to ignore it. The only effective way to stop this sort of abuse of the Act is to create severe penalties in cases where it is not observed. One of the best ways to achieve this enforcement is through judicial review. If small business owners can bring suit against regulators who have ignored the Act, the threat of such action will instill a new rigor in the regulatory process. Re-empowering the Office of Advocacy to file *amicus* briefs in appropriate cases is also important link in the judicial review chain. It should be clear that--especially without appropriate judicial review--the degree of

implementation for the Act will only be as high as the commitment the regulators have to it.

III. PROBLEM AREAS: THE I.R.S. AND PROCUREMENT

It is surely the case that no set of regulations affect small businesses more than those found in the Internal Revenue Code. Yet, largely by self-proclamation, the IRS is--for all practical purposes--exempt from the requirements of the RFA. Interpretive decisions (those intended simply to implement a statute when Congress has not delegated any real authority to the agency) are not impacted by the Act. The IRS, therefore claims that its "interpretive" rules (most of its rules) are beyond the reach of the RFA. It has long been the position of NSBU that the IRS should be placed fully under the scope of the Regulatory Flexibility Act. Simply because a ruling is interpretive in nature and is following Congressional intent does not mean that an alternative rule, more favorable and workable for small business, is not possible. Furthermore, even in instances where the IRS has little latitude from Congress to formulate an alternative rule, an analysis could be very useful to legislators to realize the problems for future decisions.

Through the years there has also been a lack of cooperation with the Act from rulemakers responsible for procurement rules. Since the federal government spends hundreds of billions of dollars per year in the private procurement market, any

discrimination against small business during the promulgation of these rules can readily be seen as a major problem. The SBA's Office of Advocacy originally reported problems with procurement rulemaking in its 1986 annual report. Although compliance seems to have strengthened since that time, there may still be a need to allow the Office of Advocacy greater authority to review rules and enforce the provisions of the Act.

IV. PAPERWORK BURDENS

The Regulatory Flexibility Act, as currently written and interpreted, does very little to reduce the small business paperwork burden. The Act requires federal agencies to consider the paperwork and reporting requirements on small business of a regulation, in addition to the more substantive impacts a regulation may have. However, there is sparse evidence the many agencies ever take this charge into consideration.

Rather than considering the paperwork burden themselves, agencies tend to rely on the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) for analyses of paperwork burdens. Under another law (The Paperwork Reduction Act), OIRA is required to centrally review regulations to be sure that they meet certain information collection requirements. Relying on OIRA for all paperwork analyses, it has been rare that an agency has adopted a paperwork system with a separate simplified approach for small businesses. Instead, these agencies have tended

to adopt a uniform and unsubstantiated statement that no simpler (and practicable) means exists to collect data from small business. An appropriate investigation--in lieu of a perfunctory statement--from these agencies would be very helpful for them to determine if this alternative may exist; it would also be very helpful to OMB and OIRA as they set about the lonely task of developing appropriate paperwork guidelines for all regulations.

V. INDIRECT IMPACT OF REGULATIONS

After more than a decade of seeing the Act in implementation, it has become clear that it should be expanded in one more significant way. As currently written, the Regulatory Flexibility Act only affects those regulations which have a direct impact on small businesses. Very often, however, some of the most devastating regulations are ones which affect businesses indirectly. For example, regulations on insurance companies and health care providers could very well impact the bottom line (either positively or negatively) of small businesses attempting to purchase and maintain health insurance. That "indirect" impact on small businesses of such regulations, not specifically written for their compliance, should enter into the impact analysis of the regulators. H.R. 9 would require such considerations, which would be a big step forward in the struggle against the adverse impact of government on small business.

The Regulatory Flexibility Act has been an important tool for keeping the burdens of regulatory whimsy and misunderstanding from overly impacting small business. Under the Act, the federal regulatory process has evolved far beyond the frequent ill-consideration of previous years. Yet, more still needs to be done. The guiding principles behind the Act are well defined; the problem remains in perfecting our tool for carrying out those principles. H.R. 9 is an important step in that direction.

National Small Business United appreciates the opportunity to testify before the Committee today. We also wish to thank the Committee for holding this hearing on a matter of such importance to small business. As this issue remains before the country, and as H.R. 9 moves its way through Congress, we stand ready to help in any way we can.

THOMAS W EWING
15TH DISTRICT, ILLINOIS

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STATEMENT SUBMITTED BY

U.S. REP. THOMAS W. EWING (R-IL)

before the
HOUSE COMMITTEE ON SMALL BUSINESS

January 23, 1995

I would like to start by thanking Chairwoman Jan Meyers and Ranking Member John LaFalce, not only for holding this hearing, but for their steadfast support of my efforts over the past three years to provide judicial review of the Regulatory Flexibility Act (RFA). Your support has been extremely critical to our success so far. In the last Congress, with your help our legislation to provide judicial review of the RFA garnered nearly 260 cosponsors and we obtained a vote of 380-36 on a "Motion to Instruct" endorsing judicial review. Although we were unable to secure final passage, those efforts have put us in a strong position to pass judicial review early in the 104th Congress. Harry Katrichis of the Small Business Committee staff has been extremely helpful in our efforts over the past three years.

In the fifteen years since Congress passed the RFA, this Committee has held numerous oversight hearings and dozens of persons have testified before the Committee concerning the implementation of the RFA. All of that testimony can be summed up in one sentence: The RFA is almost completely ignored by federal regulators because it does not have judicial review.

The small business groups appearing before the Committee today will testify to the ineffectiveness of the RFA because it does not have judicial review. I will leave it to them to tell you the story. I would like to leave the members of the Committee with two simple messages.

First, the time to pass judicial review of the RFA is now. The only persons who refuse to acknowledge the fact that judicial review is necessary are the bureaucrats in Washington, D.C. who want to continue to ride roughshod over small businesses as they have done for so many years, and those special interest groups who want to use the federal

government to advance their agendas, at the expense of small businesses and their employees.

Small businesses have been waiting for fifteen years for Congress to pass judicial review of the RFA so they can finally have a little relief from the tide of regulations flowing out of Washington, D.C. The fact that judicial review is included in the Contract with America gives us great hope, and I strongly urge the members of this Committee to work with the Judiciary Committee to ensure prompt passage of this important legislation.

Second, I strongly urge the Small Business Committee to fight for judicial review without crippling restrictions. During the 103d Congress we were excited when the Clinton administration indicated its support for judicial review. However, we were extremely disappointed when certain defenders of the status quo in the Office of Management and Budget and elsewhere convinced the administration to propose a series of restrictions on judicial review which would have left the RFA nearly as toothless as it is now. Those restrictions included an extremely short statute of limitations on RFA law suits, unnecessary limits on standing for filing RFA suits, and a limit on the ability of judges to stay crippling regulations for which an agency did not properly comply with the RFA.

I urge this Committee in the strongest terms possible to work for a clean and simple RFA judicial review which does not contain the restrictions outlined above. Those restrictions were written and supported by the very bureaucrats who have failed to comply with the RFA for 15 years. We should continue to work for the straightforward repeal of the prohibition on judicial review which was contained in H.R. 830, our legislation which was cosponsored by nearly 260 House members, which was endorsed by dozens of organizations representing hundreds of thousands of small businesses all over this country, and which is contained in the Contract with America (Title VI of H.R. 9).

I thank the Committee for affording me the opportunity to provide this testimony. Again, I thank Chairwoman Meyers, Ranking Member LaFalce and their staff for their steadfast support of RFA judicial review over the past several years. I look forward to continuing to work with you in the weeks ahead to ensure swift passage of judicial review.

SBA U.S. Small Business Administration Washington, DC 20416

Testimony of

Philip Lader
Administrator

U.S. Small Business Administration

Before

The Committee on Small Business
United States Senate

Good morning Chairman Bond and Members of the Committee. I want to thank you for inviting me to appear before you this morning to provide a general overview of the Small Business Administration's (SBA) programs and to address the future of the Agency. I hope that you will agree that I have a good story to tell about the goals and achievements of the SBA.

Mr. Chairman, having devoted 20 years to practical business and management challenges, I understand the hurdles facing small businessmen and women. I look forward to working closely with the Members of this Committee and this new Congress to champion the needs of the Nation's small businesses and oversee the SBA's programs.

The SBA was created in 1953 to aid small businesses and to help strengthen the overall economy of our Nation by increasing job opportunities, stimulating innovations, and providing a rising standard of living. It was a sound concept in 1953 and is even more compelling today. Each of the SBA's programs was developed in response to market imperfections that serve as barriers to small businesses starting and expanding. The SBA operates as a public/private partnership that uses taxpayer dollars to leverage private resources in both its lending programs and some of its business and education training programs.

Before I discuss the details of what we do at the SBA and how we do it, I wanted to begin with a brief overview of how critical small business is to the U.S. economy.

I think we all know -- intuitively -- the importance of small business. Most people I know got their first job in a small firm. I'm sure most of you probably shop at many local small businesses. Perhaps your families were involved in small businesses. You know how important the small business sector is to your community and to the economies of the states where you come from.

But beyond our own personal experiences that tell us how important small business is, we should look at the available empirical data:

The number of small businesses is growing rapidly -- its up 49 percent since 1982.

Small businesses employ 54 percent of the American work force and are responsible for 50 percent of the gross domestic product (GDP) (1993 statistics).

During 1993 small businesses accounted for 71 percent of the new job growth in the U.S.

Small businesses are our country's leading source of

innovations. Studies show they innovate at twice the rate of large firms.

And, if you believe the statistics that tie U.S. economic growth to our export performance then you have to conclude that small businesses are the key to a successful national export strategy.

With the downsizing of large corporations, the defense industry being a good example, our economic health will increasingly become tied to the health of small business.

Given that it is so clearly in our national interest to foster a strong small business sector, let's turn to the question: What does it take for today's small businesses to start, grow, and compete in the world economy?

Survey after survey, studies, town meetings, the White House Conference on Small Business Meetings, all point to small businesses needing several things that are <u>not provided adequately in the private market:</u>

Small Businesses need:

- Access to types and amounts of capital that make it possible to start and expand;

- Quality business education and training;

- An advocate dedicated to lessening the regulatory and paperwork burdens, which so negatively impact small firms and an advocate who opens doors to federal contract opportunities;

- Capital to rebuild after disasters.

All of these are the things small businesses need and they are exactly what the SBA delivers.

The SBA provides guarantees for loans that private lenders would not make on their own under the same terms and conditions -- loans for business start-up, loans with longer maturities, loans for small exporters, line-of-credit financing, loans of less than $100,000, and loans to women- and minority-owned firms. To put this in context, new data from the Bureau of the Census reported that the Nation's smallest businesses -- with 0-4 employees -- created virtually all the new jobs between 1989 and 1991. These businesses created 2.6 million net new jobs during this period.

In January 1995 the GAO reported that: "SBA 7(a) loans are more likely to go to new or start-up businesses than are commercial bank loans . . . SBA loans tend to have longer terms with lower

monthly payments than commercial bank loans . . . SBA loans have gone to the smallest businesses . . . (and) SBA loans are the primary means by which banks access the secondary market in small business loans . . . (which) is a key part of small banks' strategy for preserving scarce capital and making more loans."

Over the past two years, within its limited resources, the SBA developed, piloted and/or fully implemented a number of new programs designed to meet the special needs of small businesses. Such programs as the Low Documentation Loan Program (LowDoc), the State Treasurers "Main Street Investment Program", the Small Loan Express Program, the Women's Pre-Qualification Pilot, the Minority Pre-Qualification Pilot, the Export Working Capital Loan Program and the GreenLine Program were developed after meetings and workshops with our customers -- representatives from the small business community.

While reducing its staff size (25% percent reduction from 1980-1994), the SBA has seen its responsibility and activities grow to the point where it has had a considerable impact on the small business community. This impact takes many forms:

- The SBA's loan portfolio now exceeds **$26 billion** (excluding disaster assistance), and the Small Business Investment Companies in the SBA's SBIC program have an investment portfolio of approximately $12 billion of which $1 billion was

invested during FY 1994.

• The SBA provides much-needed business education and training to small business owners. In FY 1994 the Agency provided counselling and training to more than 800,000 of its small business clients through resource partners such as Small Business Development Centers and the Service Corps of Retired Executives. This type of training is critical to the success of entrepreneurs who cannot afford the costs of private consultants. These programs, in addition to SBA's Business Information Centers, training seminars and publications, often make the difference between success and failure for small businesses.

• During the program's 41 years, the SBA has approved more than 1.25 million disaster loans worth $22 billion to victims of physical disasters.

• Since 1985, the SBA has saved the federal government $2.0 billion by promoting contract awards to smaller firms through the Breakout Procurement program.

WHAT OUR FOREIGN COMPETITORS ARE DOING FOR SMALL BUSINESS

Mr. Chairman, I also think that it is instructive to consider what our foreign competitors are doing for their small businesses.

Virtually all of the industrialized (G-7, Organization for Economic Cooperation and Development and Asia Pacific Economic Cooperation) nations have an agency or ministry equivalent to the SBA that addresses the needs of their small business communities. In fact, many of those nations have used the SBA as a model to set up research, loan, procurement and educational programs very similar to ours.

These countries look at the remarkable U.S. job creation record over the last decade and they grasp the significance of small business growth and the stability of their economies. They know small businesses created those jobs and that the SBA is the principal U.S. government agency that assists small businesses and tracks their progress. A week doesn't go by that the SBA doesn't host several international government visitors--some from the newly emerging market economies in Eastern Europe--who are looking for the "small business formula" for their own economies.

Our more active trading partners and competitors also understand the value of knowing what makes a small business tick. In 1992, the Japanese Government created the Small Business Research Institute to serve as a "think tank" to learn how to encourage and assist the formation of their own small businesses. An affiliate organization, the Japan Small Business Corporation, trains small business managers and employees at small and medium-sized enterprise (SME) colleges. In FY 1993, 11,229 business

people were trained at the eight, government-sponsored colleges on a budget of $316 million dollars, which included funds for the construction of a ninth SME college that opened in 1994.

The Japanese are keenly interested in what U.S. small businesses are doing. For the past 10 years, *The State of Small Business: A Report of the President,* prepared annually by the SBA, has been translated into Japanese and reprinted by the Japanese Government--sometimes in a larger print-run than the original U.S. version.

MAKING THE CASE FOR TODAY'S SMALL BUSINESS

When I first arrived at the SBA, I tried to make sense of the myriad of programs I found there. To understand the role the SBA plays for its small business customers, I realized that it is easiest to think about the agency in terms of the four primary functions it provides to the Nation's entrepreneurs. These functions include: access to capital; business education and training; advocacy; and, what I refer to as the SBA that nobody knows -- disaster assistance.

I would like to outline these functions quickly, and I will be happy to answer specific questions about the SBA's programs.

Access to Credit:

The SBA is, first and foremost, a public/private partnership that leverages billions of dollars from private and non-profit lending institution dollars with a relatively small amount of taxpayer funds.

Examples of this great leverage include:

- The reforms proposed to the 7(a) in the President's FY 1996 budget would allow every taxpayer dollar to leverage $50 in private loan funds.

- Each taxpayer dollar in the 504 Development Company program provides $200 dollars in private financing.

- In FY 1994 the Agency leveraged just $232 million of tax dollars into $10.6 billion worth of business loans.

- Every taxpayer dollar spent on the small business training offered by the Agency's SBDCs is matched by the states.

- The SBA works in partnership with approximately 7,000 private lenders across the U.S.

Access to capital is clearly a major concern of small businesses. As you know, the Congress created a White House Conference on Small Business to give America's small business community an opportunity to make its views known to the Administration and the Congress. Leading up to the June White House Conference on Small Business, 65 state and regional conferences have been or are being organized. At every one I have attended, and all others, I am told, access to capital was clearly one of the top three issues of concern to conference delegates. The SBA's financing programs help to address this concern.

The SBA's financing programs, which broadly include the 7(a) General Business Loan Program, the 504 Development Company Program, the Small Business Investment Company Program, the Specialized Small Business Investment Company Program, the Microloan program, and the Surety Bond program together provided $10.6 billion of financial assistance in FY 1994. The cost to the taxpayer of these programs was only $232 million. We are requesting a budget to support $13.3 billion of financing in FY 1996 at the cost of only $270 million.

Business Education and Training:

Small business owners or aspiring business owners look to the Federal government not only for capital, but information, education, and training. Often, this training and education may be

the missing link to access to capital. Private sector companies offer some of the services provided by the SBA, but many start up businesses cannot pay the fees charged by such companies. Further, small business owners find themselves looking for general information and advice that may extend over several professional discipline areas. The SBA has a full range of education and training programs. The Agency provides: electronic information that can be accessed through SBA OnLine; basic business training as well as state-of-the-art specialized training; and individually tailored planning, mentoring, and networking programs.

The Small Business Development Center (SBDC) Program meets the counseling and training needs of more than 500,000 clients annually through a network of more than 900 SBDCs throughout the country. Business development assistance offered throughout the SBDC network is tailored to the local community and the needs of individual small business customers.

The Service Corps of Retired Executives (SCORE), through one-on-one counseling and workshops, reaches approximately 350,000 businesses owners annually, providing more than one million hours of counseling and training throughout the United States.

Among the most innovative methods of providing a one stop approach to information, education and training to small business owners is the Business Information Center (BIC) program. BICs

combine the latest computer technology, hardware and software, an extensive small business reference library of hard copy books and publications to help entrepreneurs plan or expand their business.

The SBA also is in charge of coordinating the Federal government's outreach efforts to inform the small business community about Electronic Commerce, which is the method by which all small business vendors will be required to do business with the federal government.

Advocacy:

The SBA exists primarily because small businesses don't have the clout that big businesses do. The SBA is charged with advocating for small business customers who have been shut out of markets that traditionally have been dominated by big business. The Agency's Government Contracting division ensures that small businesses have access to Federal procurement opportunities. The Small Business Innovative Research and Small Business Technology Transfer programs provide small technology companies access to federal research and development funds. The Minority Enterprise Development, or 8(a) program, opens doors to government contracts for minority firms.

But the advocacy role doesn't stop there.

The Federal government affects small businesses through nearly all of its agencies and departments; programs which help or hinder small business health and success are not limited to the Small Business Administration.

I believe that successful advocacy of small business interests in every government activity is a crucial measure of an effective SBA.

Congress shares this belief and proved it through the creation of a separate Office of Advocacy, headed by a Chief Counsel who is a Presidential appointee confirmed by the Senate.

The Office of Advocacy, among other things, is charged with these tasks:

- developing and maintaining a small business data base;

- monitoring agency implementation of the Regulatory Flexibility Act, 5 U.S.C. 601-612 (a procedural statute that requires agencies to analyze the impacts of their regulations on small business and, whenever possible, reduce those burdens);

- preparing and publishing the President's annual Report to the Congress on the State of Small Business; and

- preparing materials for the White House Conference on Small Business.

True advocacy is not limited to the Office of Advocacy but is pervasive in all of the SBA's activities. Advocacy of the small business cause has led to many of the accomplishments we reached this past year -- Export Assistance Centers and One Stop Capital Shops for example.

But advocacy must go beyond looking at leveraging SBA's programs; we are spearheading this Administration's efforts to reduce the regulatory burdens on small business. We recognize that the economy has begun to rely on both small business' job creation activities and its abilities to fill gaps in the marketplace. The SBA recognizes the importance of lowering barriers of entry into new fields for small business and removing unnecessary regulatory impediments to growth. A change in one environmental regulation can have an enormous impact on small firms throughout the United States.

As you know, President Clinton issued Executive Order No. 12866 on September 30, 1993, calling upon federal agencies to streamline the regulatory process, reduce the burdensome impact of their regulatory actions, and engage in better long-range planning. In response, the SBA and the Office of Information and Regulatory Affairs (OIRA) initiated a coordinated inter-agency effort to

identify, recommend, and implement regulatory reforms. Over a period of five months, more than 150 small businesses owners and representatives worked with 80 agency personnel to consider the cumulative impact of five designated agencies' regulations on small business and to suggest recommendations for further action. The findings of the inter-agency working groups were published last July, and we are now working with the other participating agencies to implement those recommendations.

Disaster Assistance:

The SBA plays a major role in the wake of hurricanes, floods, earthquakes, wildfires, tornados and other physical disasters. In the aftermath of the Northridge earthquake and other disasters, the SBA approved more than 125,000 loans for more than $3.8 billion in FY 1994. In the aftermath of the Midwest floods, Hurricanes Andrew and Iniki, the Los Angeles civil disturbances and other recent disasters, SBA approved 58,644 disaster loans for $1.67 billion during FY 1993, and another 23,417 disaster loans for $794.6 million in FY 1992. Since the inception of the program in 1953, the SBA has approved more than 1,277,000 disaster loans for more than $22.5 billion.

The SBA's disaster loans are the primary form of Federal assistance for nonfarm, private sector disaster losses. For this reason, the disaster loan program is the only form of SBA

assistance not limited to small businesses. Disaster loans from the SBA help homeowners, renters, businesses of all sizes and non-profit organizations fund rebuilding. The SBA's disaster loans are often the lifeline in disaster ravaged communities, helping to spur employment and stabilize the tax base.

By providing disaster assistance in the form of loans which are repaid to the U.S. Treasury, the SBA disaster loan program helps reduce Federal disaster costs compared to other forms of assistance, such as grants. When disaster victims need to borrow to repair damages not covered by insurance the SBA tailors the repayment of each disaster loan to each borrower's financial capability. Moreover, providing disaster assistance in the form of loans rather than grants avoids creating an incentive for property owners to underinsure against risk. In addition, our proposed interest rate reform for this program would further eliminate unnecessary subsidies. Disaster loans require borrowers to maintain appropriate hazard and flood insurance coverage, thereby reducing the need for future disaster assistance.

The law gives SBA several powerful tools to make disaster loans affordable: low interest rates, long terms (up to 30 years), and refinancing of prior debts (in some cases).

STREAMLINING THE SBA

Before I conclude, Mr. Chairman, I want to mention how the SBA has worked together with Vice President Gore and the National Performance Review to streamline its programs to provide better service to our small business customers and to continue to meet the needs of previously underserved borrowers. The Agency has developed all of the following reinvention initiatives in the last two years:

- Low Documentation Loan Program (LowDoc) -- The LowDoc program reduces the paperwork burden imposed on lenders by allowing a one-page SBA application form for loans of $100,000 or less. We have provided each of you with a copy of the form. During the first quarter of FY95 we made 7,765 LowDoc loans, which translates into $427 million into the economy. This represents 55 percent of the total number of 7(a) loans and 19 percent of the total dollar amount of 7(a) loans.

- Women's Pre-Qualification Pilot Loan Program (currently being piloted at 16 sites) -- This program increases access to capital for women-owned businesses by prequalifying their loan application before the borrower approaches a lender. As of January 12, 1995, under this pilot program, the SBA issued 316 pre-qualification

letters and approved 193 loans for a total of $20 million.

- Export Working Capital Program -- The SBA is now operating its export initiatives in harmony with Eximbank's program, providing loans to small businesses to support their exporting activities. We are now working on establishing aggressive goals for our field offices for this program.

- GreenLine Program -- The GreenLine Program provides a variety of short-term loans and revolving lines of credit. This type of credit product is rarely available to small businesses or start ups through the private sector.

- Commercial Loan Servicing Centers -- We have developed these centralized loan servicing centers to make SBA's loan servicing activities more efficient and cost-effective.

- Loan Processing Center -- We have implemented centralized loan processing, which provides efficient, consistent and cost-effective processing of the Preferred Lender Program (PLP) loans.

- Main Street Investment Program -- A new pilot begun in October in Pennsylvania, the Main Street Program, creates a partnership between the SBA, State governments, and private lenders. State tax dollars are invested in community banks that commit to using these funds to provide LowDoc loans for small borrowers.

- Small Loan Express Program -- This program will be piloted with 18 lenders beginning in February. The program allows lenders to use their own forms and processes for loans up to $100,000 in exchange for a reduced 50 percent guaranty from the SBA.

- Minority Pre-Qualification Pilot Loan Program -- This program, which will be piloted at up to 15 sites beginning in March, increases access to capital for minority-owned businesses by prequalifying them for a loan guarantee before they approach a lender. The program is modeled after the Women's Pre-Qualification Pilot Loan Program.

- Streamlining Agency -- To provide increased customer service to the small business community and still maintain the ability to do more with less, the Agency completed a two-phased reassignment program in which 77 people moved from our Washington headquarters and 150

people moved out of our regional offices to various district offices where our customers are located. These voluntary transfers stripped redundant layers of bureaucracy from the SBA field operations. The downsizing also includes staff reductions through attrition with the attendant increased reliance on automation.

These streamlined products and processes reflect the SBA's determination to reach small business customers in the most cost-effective way.

Mr. Chairman, I very much believe that the SBA and all of its programs are critically important to the continued growth of small business in this country. I hope to work very closely with Members of this Committee to design program changes that will allow us to maintain programs able to meet the needs of as many small businesses as possible within necessary budget constraints.

Thank you, Mr. Chairman. That concludes my prepared remarks. I will be glad to answer any questions you may have.

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